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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 935

THE RIVERSIDE PRESS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on June 17, 1969.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals, printed in Appendix B hereto, infra p. B-1, is reported in 415 F. 2d 281.

JURISDICTION

The judgment of the Court of Appeals was entered on the 17th day of June, 1969, R. 164, Appendix B hereto, p. B-1, infra. Rehearing was denied on September 11, 1969, R. 167; Appendix B hereto, p. B-23, infra. The jurisdiction of this Court is invoked under 28 U.S.C., § 1254 (1).

QUESTIONS PRESENTED

1. May a Regional Director of the National Labor Relations Board[1] order an employee of his office to conduct a hearing which is expressly proscribed by the Act, and thereafter may the Board, in an unrelated unfair labor practice proceeding, use the results obtained in such illegal hearing to deny an employer a hearing before a professional trial examiner, on the basis that the unfair labor practice charge had been "previously litigated" by the Regional Director's employee.

2. May an employer be adjudged guilty of an unfair labor practice on nothing more than the record of an unrelated hearing which was conducted (1) in direct contravention of the Act,[2] (2) before a non-professional subservient employee of the Regional Director, and (3) without the safeguards of the rules of evidence.

3. Does a "cursory look" at the record by the Court of Appeals before enforcing a Board order under section 10(e) of the Act meet the clear statutory requirement that Board orders must be supported by substantial evidence on the record considered as a whole?

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1. Hereinafter referred to as "the Board."

2. The Labor Management Relations Act, 1947, as amended, 61 Stat. 136, 29 U.S.C. Sec. 141 et. seq. will be referred to hereinafter as "the Act."

STATUTES INVOLVED

The Statutory Provisions involved are:

(1) Labor Management Relations Act, 1947, as amended,

(a) Sec. 3(b), 29 U.S.C. 153, 61 Stat. 139, as amended.

(b) Sec. 9(c)(1), 29 U.S.C. 159, 61 Stat. 143, as amended.

(c) Sec. 10(b),(e) and (f), 29 U.S.C. 160, 61 Stat. 146, as amended. (appendix A hereto, infra, page A-1, et seq.)

(2) Government Organization and Employees Act

(a) 5 U.S.C. 554, 80 Stat. 384
(b) 5 U.S.C. 556, 80 Stat. 386
(c) 5 U.S.C. 706, 80 Stat. 393 (appendix A hereto, infra, page A-5 et seq.)

STATEMENT OF THE CASE

Petitioner is engaged in the manufacture, sale and distribution of printed material and related products. (R. 145) In June of 1966 the Union[3] filed a petition for certification as bargaining agent for certain employees of Petitioner and in September a Board supervised election was conducted. Of 53 eligible voters, 26 cast votes for the union, 22 cast votes against the union, 1 ballot was voided and 4 ballots were challenged by the Union. Therefore, the challenged ballots were sufficient in

3. Local 267, Dallas – Fort Worth Lithographers and Photoengravers Union, AFL-CIO will be referred to herein as "the Union".

number to affect the results of the election. The 4 ballots were challenged on the basis that employees Woods, Cacioppi, Wiley and Schilling were each supervisers. (R. 135, 136 and 43)

By a Supplemental Decision and Order, the Board's Regional Director overruled the challenges to the Ballots of Woods and Cacioppi and ordered that such ballots be counted. In such Order, the Regional Director also provided:

> "It is further ordered that if the results according to the revised tally of ballots are inconclusive and that the ballots cast by Schilling and Wiley are determinative, then a hearing shall be directed before a hearing officer to be designated by the undersigned, for the purpose of making *credibility resolutions, finding of fact and recommendations* going to their supervisory status." (Emphasis added) (R44-45)

The ballots of Woods and Cacioppi were opened and a revised Tally of Ballots was issued which reflected that 26 votes had been cast for the Union, 24 votes had been cast against the Union, and two ballots remained challenged. Thus, the two undetermined challenges could again affect the results of the election. (R 46, 47)

A hearing was then conducted before a hearing officer designated by the Regional Director (R. 48) and the hearing officer subsequently issued his report finding that both Wiley and Schilling were supervisers and recommending that the challenges to their ballots be sustained. (R 46-57)

The Regional Director then issued a Second Supplemental Decision wherein he adopted the hearing officer's recommendation with respect to the ballot of Schilling but overruled the challenge to Wiley's ballot. However, in view of the Regional

Director's decision to sustain the challenge to Schilling's ballot the ballot of Wiley could no longer affect the results of the election and therefore the Regional Director certified the Union as the duly authorized representative of certain of Petitioner's employees. (R. 68-72) Petitioner's request for review of such Second Supplemental Decision (R. 73-94) was denied by the Board. (R. 95)

Upon Petitioner's refusal to bargain with the Union, the Regional Director issued a Complaint alleging that Petitioner had violated Sections 8(a)(1) and (5) of the Act by such refusal. (R. 99-105) In its answer to such Complaint Petitioner denied, among other things, (1) that the Union had been designated and selected by a majority of the Unit employees as their collective bargaining representative and (2) that Petitioner had violated the Act in any way. (R. 106-107)

Thereafter Counsel for the General Counsel filed a Motion For Judgment On The Pleadings (R. 108-114) and such Motion was sustained by the Trial Examiner on the basis that all matters in controversy had been "previously litigated" in the Representation Proceeding. (R. 135, 149) The Trial Examiner's decision was adopted by the Board without opinion. (R. 162) Petitioner then sought to have such order set aside by the Court of Appeals for the Fifth Circuit and the Board cross-petitioned such Court for enforcement of the order. After refusing to set such order aside as requested by Petitioner, the Court of Appeals held as follows with respect to the petition for enforcement:

> "However, so far as the Board's cross-petition for enforcement is concerned, *possibly we should take a*

> *cursory look at the adequacy of the Board's findings to support its order,* on the assumption that the special statutory basis for the Court's decision in *NLRB v. Ochoa Fertilizer Corp.*, 1961, 368 U.S. 318, is not present here, *leaving a burden of sorts upon the Board* in spite of the employer's lack of argument." (Emphasis Added) (appendix B hereto, infra, page B-8)

The Court of Appeals for the Fifth Circuit has jurisdiction of this case under the provisions of Sections 10(e) and (f) of the Act.

REASONS FOR GRANTING THE WRIT

1. In this case, Petitioner has been found guilty of the unfair labor practice of refusing to bargain *without ever being afforded a hearing before a Trial Examiner.* This erroneous decision of the Board has been upheld by the Court of Appeals. A careful reading of the Act discloses that the decisions of the Board and the Court of Appeals in this case are in direct contravention of the Act.

In upholding the Board's decision, the Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court. A review of the pertinent portions of the Act directly involved here reveals that the result achieved in this case was never contemplated by Congress in passing the Act but, to the contrary, such result is in direct violation of the Act.

Other than unfair labor practice hearings before a Trial Examiner, the only provisions of the Act having to do with *hearings* are the following pertinent portions of Section 9(c)(1) and Section 3(b):

> "Sec. 9(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by

the Board —***the Board shall investigate such Petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. *Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto.* If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof. (Emphasis Added)

"Sec. 3(b) ***The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its Regional Directors its powers under Section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under Sub-section (c) or (e) of Section 9 and certify the results thereof, ***".

The above provisions are the *only* provisions of the Act having to do with Representation Proceedings and the *only* hearings provided for therein are hearings to determine *whether a question of representation affecting commerce exists.* Such Sections do not refer to any other hearings in a Representation Proceeding, and there is certainly no authorization in such Sections for any other type of hearing to be conducted by the Regional Director, his staff, or employees.

The Court below has twice recognized that in election proceedings the Act only provides for *pre-election hearings.* In *U.S. Rubber Co. v. NLRB,* 373 F. 2d 602, (5th Cir. 1967), the Court below held:

"In election proceedings the Act provides only for pre-election hearings." (at page 604);

and in *Home Town Foods, Inc. v. NLRB,* 379 F. 2d 241 (5th Cir. 1967) it was stated:

> "The Act provides only for pre-election hearings." (at page 242)

In this case however, the Regional Director ordered a post election hearing on the challenges to the ballots of Wiley and Schilling. When Petitioner was then charged with refusing to bargain with the Union, the Board's motion for judgment on the Pleadings was sustained on the ground that all matters in controversy had been "previously litigated." This action has been affirmed by the Court of Appeals. In so doing, the Court conveniently overlooked two controlling points:

1. There is absolutely no provision contained in the Act which authorizes the post election "hearing" conducted by the Regional Director's employee.

2. In the event the Act could be tortured into some posture which would authorize such post election "hearing" then the following provisions of the Act with respect to Representative Proceedings cannot be ignored.

> "Such hearing may be conducted by an officer or employee of the regional office, *who shall not make any recommendations with respect thereto.*" (Sec. 9(c)(1))

That the post election "hearing involved here is contrary to the plain import of the Act is readily apparent when the legislative history of the Act is considered. Section 9(c) of the National Labor Relations Act of 1935[4] provided as follows:

> Whenever a question affecting commerce arises concerning the representation of employees, the Board may investi-

4. 49 Stat. 453

> gate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under Section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives."

Under this provision of the National Labor Relations Act, regional office personnel of the Board sat as hearing officers and made extensive recommendations to the Board. Congress, when considering the passage of the Labor Management Relations Act of 1947, was cognizant of such fact as reflected by Senate Report No. 105 on Senate Bill No. 1126 wherein is found the following:

> "One further change in current Board practice is required by this Sub-section. Regional office personnel now sit as hearing officers in *Representation cases* and make a comprehensive report and recommendation to the Board at the close of such hearing. *By the amendment, such hearing officers' duties are confined to presiding at the hearing.*"[5] (Emphasis Added)

In the House Conference Report No. 510 on HR 3020 is found the following:

> "Under the Senate Amendment it was provided that such hearing could be conducted by an officer or *employee in the regional office who,* when he reported to the Board with respect thereto, *was prohibited from making any recommendations.*"[6]

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5. Legislative History of the Labor Relations Act, 1947, published by the National Labor Relations Board, US Government Printing Office, 1948, page 431.

6. Legislative History of the Labor Relations Act, 1947, published by the National Labor Relations Board, US Government Printing Office, 1948, page 554.

As pointed out earlier, the Act, as ultimately passed by Congress, provides with respect to hearings conducted before employees of the regional office:

> "Such hearing may be conducted by an officer or employee of the regional office, *who shall not make any recommendations with respect thereto.*" (Emphasis Added)

When one considers (a) the practice as it existed under the National Labor Relations Act, (b) the attention given to such practice by Congress in passing the Labor Management Relations Act of 1947, and (c) the unequivocal prohibition contained in the later Act, it cannot be reasonably contended that the post election hearing which was conducted before "Hearing Officer" Billy M. Gibson, was, by any stretch of the imagination, authorized by the Act.

In this connection, Petitioner would also call to the attention of the Court the "Hearing Officer's Report on Challenged Ballots." Such report begins as follows:

> *"It is the recommendation of the undersigned* that the challenge to the ballots of Marjorie Wiley and Andrew Schilling be sustained. *It is further recommended* that the Regional Director for the Sixteenth Region issue a Decision and Order adopting the Hearing Officer's recommendations ***" (Emphasis Added) (TR 56)

This report clearly violates the prohibition contained in Section 9(c)(1) of the Act.

In answer to Riverside's contention in this regard, the trial Examiner, in his decision which in effect granted the Board a Summary Judgment, lamely concluded:

> "I am cited to no authority forbidding an administrative agency of the United States Government to hold a hearing

> prior to disposition of issues within its competence if it deems such action necessary***" (TR 144) (Appendix B, p. B-37)

Petitioner would not quarrel with that statement so long as it refers only to "a hearing," but Petitioner indeed cited the Examiner the *Act* expressly forbidding this *type hearing*. Thus, the Examiner's statement tends to prove what many people have long contended, i.e., that the Board does not consider itself bound by authority of the Act itself but only by its own regulations. *Further, neither the Trial Examiner nor the Board cites any statutory authority whatsoever which authorizes the "type of hearing" which was conducted in this matter,* and Petitioner submits that none is to be found. The Act does not authorize a post election hearing by the Regional Director and therefore the Act does not confer any jurisdiction upon the tribunal conducting such hearing. Only those issues which have been determined by a tribunal of *competent jurisdiction* can be held to have been "previously litigated."

The Court of Appeals even more lamely ignored this issue with the statement:

> "Such hearings have long been held. It is not necessary that they be specifically provided for by statute."

If this holding is a correct statement of the law, then this Honorable Court was wrong in holding that the long maintenance of separate but equal school systems did not make such practice right or acceptable under the law.

The importance of having only those matters which have been determined by a Trial Examiner deemed "litigated" is obvious when one considers the difference between a Trial

Examiner and a Hearing Officer. Under the Act, hearings ordered by the Regional Director may be conducted by an "*** employee of the Regional office***" Under this liberal designation, any employee of the Regional Director's office, including secretaries and/or janitors, may act as "Hearing Officers". Unquestionably, many of the "employees" in the Regional Director's office are not suited by temperament, training, experience or education to conduct a hearing upon the record of which an employer may be found *"guilty"* of an unfair labor practice.

Trial Examiners however, are competent to conduct such hearings. On the basis of an applicant's experience in administrative law, a written examination, and an oral interview by an examining committee, the Civil Service Commission maintains a special register of about ten or twelve persons considered to be qualified for appointment as a Trial Examiner. The selection of a new examiner is made by the Board on the basis of a personal interview and the recommendation of the Chief of the Division of Trial Examiners. After appointment, an examiner undergoes a training period of lectures, going out as an observer with an experienced examiner; and then starts in on his own with relatively simple cases and gradually works up to the tougher ones.[7] It has been said that Trial Examiners "resemble judges of federal district courts in that they are appointed in effect for life, act purely in a judicial capacity, render initial decisions, and have nothing to do with the disposition of their cases by the Board."[8]

7. Labor Law Developments, 14 Annual Institute, Southwestern Legal Foundation, Page 124.

8. Labor Relations Expediter, Labor Relations Reporter, Bureau of National Affairs, Inc., LRX 319.

Under the provisions of 5 U.S.C. Sec. 554[9] a Trial Examiner cannot "***be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions***" Unquestionably an "employee" of the Regional Director is "responsible to" and "subject to the supervision or direction", or whim, of a person directly engaged in the supervision of "investigative or prosecuting" functions.

Obviously nothing has been "litigated" in this case but the Court of Appeals was completely taken in by the Board's fallacious *"re-litigate"* argument. Petitioner is not seeking to "re-litigate" anything because representation proceedings are "***not even litigation***" In *Foreman & Clark, Inc. v. NLRB*, 215 F. 2d 396 (9th Cir. 1954) it was held:

> "As we have already seen, representation proceedings are 'essentially informal, not adversary.' Inland Empire Council v. Millis, supra, 325 US at page 706, 65 S.Ct. at page 1321. They are 'not even litigation, but investigation.' National Labor Relations Board v. Botony Worsted Mills, supra 133 Fed 2d at page 882." (at page 408)

If Representation Proceedings are "not adversary" and "not even litigation", how can it be said that the matters involved therein have been "litigated". Therefore, it is certainly incorrect to state that such matters cannot be "re-litigated" in an unfair labor practice proceeding because the prefix *re* means "to do again" and it is impossible to do again that which has never been done.

Congress did not intend that every matter remotely relating to the representation proceeding should be considered as

9. 80 Stat. 384.

"litigated". The Senate Minority Report No. 105 on Senate Bill 1126 took great exception to that portion of the Bill which provided that hearing officers in representation proceedings should not make any recommendation with respect to the matter under consideration. In such report is found the following:

> "Section (9)(c)(1)(B) *prohibits* hearing officers in representation cases from making any report or recommendation to the Board***.
>
> These investigations are fact finding, to determine the identity of the representatives selected, if any; *they are entirely non-adversary; and they result in no order requiring the employer to do or refrain from doing anything****".[10]

In other words, the very reason the minority complained of the prohibition was because it involved *only* non-adversary type hearings and matters (i.e. simple election proceedings), which will "result in no order" adversely affecting the employer. Yet, the Board says the "simple non-adversary" hearing, conducted on the "simple" election issue, is now conclusive to find Petitioner guilty of an unfair labor practice.

For yet another reason, Petitioner submits that it should not be found guilty of an unfair labor practice until it has been afforded a hearing before a Trial Examiner. Section 10(b), after providing for a hearing before a Trial Examiner, provides:

> "Any such proceeding shall, so far as practicable, *be conducted in accordance with the rules of evidence* applicable in the district courts of the United States under

10. Legislative History of the Labor Management Relations Act, 1947, published by the National Labor Relations Board, US Government Printing Office, pp. 495-496.

> the rules of civil procedure for the district courts of the United States, * * * * *" (Emphasis Added)

The "hearing" in this matter was conducted pursuant to Section 102.66 of the Board's Rules and Regulations which provides as follows:

> "Witnesses shall be examined orally under oath. *The rules of evidence prevailing in courts of law or equity shall not be controlling.*" (Emphasis Added)

The Statute and Regulation are in direct conflict and Petitioner should not be found *guilty* of an unfair labor practice until it has been afforded a hearing conducted in accordance with the plain provisions of the Act.

That the right to have a hearing in an unfair labor practice proceeding conducted in accordance with established rules of evidence was deemed important to Congress is apparent when one considers House Report No. 245 on HR 3020 wherein is found the following:

> "Evidence—Another important change concerns the evidence before the Board. The present act (Sec. 10(b)) says that rules of evidence prevailing in courts of law and equity shall not be controlling.
>
> * * * *
>
> Thus the act gives the Board great latitude in choosing the evidence that it will believe and gives great effect to findings that rest on that evidence.
>
> * * * These clauses of the act have resulted in what the courts have described as 'shocking injustices' in the Board's rulings, 'assinine reasoning' by the Board, findings 'overwhelmingly opposed by the evidence,' findings that 'strain our credulity,' and 'remarkable discrimination' on the part of the Board in believing its own witnesses and in dis-believing others.

* * * * * *

> Courts often have deferred to the assumed expertness of the Board when their own judgment would lead them to disagree. The Board's expertness is largely theoretic. See: T. R. Iserman, *op. cit.*, pp. 60-62.
>
> Requiring the Board to rest its rulings upon facts, not interferences, conjectures, background, imponderables, and presumed expertness will correct abuses under the act.
>
> *The bill does this, by providing in Section 10(b) of the amended Labor Act that 'so far as practicable,' the new Board's proceedings shall be conducted 'in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure'.*"[11] (Emphasis Added)

In the House Conference Report No. 510 on HR 3020 is found the following:

> "* * * If the Board is required, so far as practicable, to act only on legal evidence, the substitution, for example, of assumed 'expertness' for evidence will no longer be possible."[12]

The intent of Congress was to prevent any person being found guilty of an unfair labor practice until he had been afforded a hearing conducted in accordance with established rules of evidence before a proper hearing officer. In spite of this fact, however, Petitioner finds itself in the position of being found guilty of an unfair labor practice when it has been afforded nothing more than (1) an unauthorized hearing, (2) conducted by an unauthorized officer, (3) under regulations which provide that "The rules of evidence prevailing in courts

11. Legislative History of the Labor Management Relations Act, 1947, published by the National Labor Relations Board, US Government Printing Office, pp. 331-332.

12. Legislative History of the Labor Management Relations Act, 1947, published by the National Labor Relations Board, US Government Printing Office, p 557.

of law or equity shall *not* be controlling." (Emphasis Added) (Section 102.66, Board Rules and Regulations)

The following example will clearly illustrate Petitioner's point. Let us assume that X Company has a representation election and the Petitioning Union, being well aware of all persons who are not in favor of such Union, challenges the ballots of all persons the Union regards as unsympathetic with its cause. In such a situation, the Union would, of course, get the majority of the unchallenged votes cast. Let us then assume that the Regional Director calls a hearing on such challenged ballots, as was done in this case, and that for reasons of his own (personal or otherwise), the hearing officer who presides over such hearing is extremely desirous that the Union win such election. The Hearing Officer then issues a "Hearing Officer's Report on Challenged Ballots" which sustains all of the Petitioning Union's challenges and *recommends* that the Regional Director certify such Union as the bargaining representative. Based upon such recommendations, the Regional Director then certifies the Union as the bargaining representative. When the employer refuses to bargain with the Union, the Regional Director, as in this case, switching hats from an investigator to a prosecutor files an unfair labor practice complaint based upon Section 8(a) (5) of the Act. In such case, as in this case, the Counsel for the General Counsel would undoubtedly rush to the ramparts with a Motion for Judgment on the Pleadings alleging that all matters in the unfair labor practice proceeding had been previously "litigated" in the "Representation Proceeding."

Such a result is entirely possible, and it is unquestionable that such a result was never contemplated by Congress. To the

contrary, it is plain that the intent of Congress was to directly prohibit such result because Congress provided that any officer or employee of the Regional Director who conducted any "representation hearing" *"shall not make any recommendation with respect thereto."*

The Court below, in spite of an attempt on its part to distinguish it, reached a result directly opposite to the result reached in this case in *Heights Funeral Home, Inc., vs. NLRB,* 385 F. 2d 879, (1967). In the *Heights* case, the Union filed its Representation Petition covering non-supervisory employees of Heights Funeral Home. The representation hearing began on July 16th and was recessed to August 4th. On that date, it was stipulated by the Union and the employer that one Jackson J. Matthews was a supervisor. On August 6th, there was another recess to August 11th. Matthews was discharged during such recess. "As might have been anticipated, this 'put the fat in the fire' ".[13] On August 9th, Matthews filed an unlawful discharge complaint with the Regional Director. When the representation hearing was reconvened on August 11th, Matthews' supervisory status became an issue, was fully explored, and despite the prior stipulation, the Regional Director held that Matthews, in fact, had not been a supervisor.

On January 31, 1966, an unfair labor practice hearing began on Matthews' complaint that he had been unlawfully discharged. The Trial Examiner, as in this case, refused to hear evidence with respect to Matthews' supervisory status on the ground that the issue had already been "litigated" in a representation proceeding.

13. 385 F. 2d at Page 880.

The Court of Appeals for the 5th Circuit held, in refusing to enforce the Board's order, that the employer ". . .must be given an opportunity to relitigate the supervisory status of Jackson J. Matthews. . .". Certainly there can be no logical reason for giving the employer in the *Heights* case an opportunity to relitigate the supervisory status of Matthews and in denying Petitioner in this case an equal opportunity with respect to the supervisory status of Schilling.

Under the holding in the *Heights* case, Petitioner would be entitled to litigate fully the supervisory status of Schilling with respect to an alleged wrongful discharge of Schilling but is not entitled to litigate such supervisory status in a refusal to bargain case. To further illustrate the inconsistency of the Court, the Trial Examiner in the wrongful discharge case could conclude that Schilling was not a supervisor and that Petitioner had violated the Act in discharging him. The Trial Examiner in the refusal to bargain case, under the Board's position herein, would be bound by the Regional Director's finding that Schilling was a supervisor and as a natural result thereof would find (1) Schilling's ballot should not be counted, and (2) Petitioner was therefore guilty of the refusal to bargain charge. In light of past decisions of the Board, this result is not at all unlikely. A real dilemma would be created if the wrongful discharge and refusal to bargain cases were consolidated. Then the Trial Examiner would, under *Heights*, hear evidence with respect to Schilling's supervisory status in the wrongful discharge case but refuse to hear such evidence in the refusal to bargain case. Petitioner will not even speculate as to what the decision might be in that instance.

2. The decision of the Court below in the instant case (Appendix B hereto, page B-1) is in conflict with the decision of the United States Supreme Court in *Universal Camera Corp. vs. NLRB,* 1951, 340, US 474, 95 L.Ed. 456, 71 S.Ct. 456 (Appendix C, infra, page C-1). In the instant case the Court below applied a completely erroneous standard of review of Board orders as evidenced by the following holding:

> "However, so far as the Board's cross-petition for enforcement is concerned, *possibly we should take a cursory look at the adequacy of the Board's findings to support its order. . .*" (Emphasis Added)

This Honorable Court has long held that such standard is not sufficient.

Justice Godbold of the Court below, in a cogent dissent, took issue with the majority of the Court with respect to the standard of review utilized by such majority. (Dissenting Opinion, Appendix B, infra, page B-9). In such dissent, Justice Godbold calls attention to the *Universal Camera* standard of review, which is as follows:

> "To be sure, the requirement for canvassing 'the whole record' in order to ascertain substantiality does not furnish a calculus of value by which a reviewing court can assess the evidence. Nor was it intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. Nor does it mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo.* Congress has merely made it clear that a reviewing court is

> not barred from setting aside a Board decision *when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.*" (Emphasis Added)

Certainly the *Universal Camera* standard is a far cry from a "cursory look".

The United States Court of Appeals for the Third Circuit in the recent decision of *Carroll v. Frontera Compania Naviera,* S.A., 390 F. 2d 311, 316 (1968) had occasion to define the word "cursory" in the following language:

> "Webster's New International Dictionary (2d ed.) defines the word 'cursory' in a number of fashions, as for example, 'rapidly, often superficially, performed with scant attention to detail; passing hurriedly over or through something which invites exhaustive treatment'. The synonyms given by the dictionary make it clear that *a 'cursory' examination is an insufficient one.* at least under the circumstances at bar. See Webster's Dictionary, supra, where 'hasty, passing, evanescent, unmethodical, disconnected, irregular, fitful; rambling, roving' are given as synonyms for 'cursory'." (Emphasis Added)

If this "cursory look" standard is allowed to be adopted by the Court of Appeals for the Fifth Circuit as the standard of review under Section 10(e) of the Act, then it will be a unique standard among the Circuits.

Until the decision in the instant case, the Board has, since the enactment of Taft-Hartley, been required in Section 10(e) cases to carry the burden of persuasion to convince the reviewing Court that its order is "supported by substantial evidence on the record considered as a whole". This is in accordance with the requirement of 5 U.S.C. Sec. 556(d): "Except as otherwise

provided by statute, the proponent of a ***order has the burden of proof." This burden has never before been considered to be altered or diminished by reason of an employer filing a Section 10(f) proceeding.

The effect of the opinion of the Court below is to shift the burden from Board to employer with respect to the issue of substantiability of evidence. Heretofore the employer could under Section 10(f) attack the Board's order for any defects it believed to exist. It could elect by such process to seize the burden and argue no substantial evidence. But, heretofore, there has been nothing that required the employer to carry the burden on this issue. Up to this time the employer has had the right to require the Board to establish the substantiability of its evidence in support of its own order.

The following language from *Universal Camera* is particularly applicable to the instant case:

> "We conclude, therefore, that the administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. *Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function.* Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds." (Emphasis Added)

If the cursory standard of review adopted by the Court below is allowed to stand, this Court will have given its sanction to a complete *abdication* of the judicial function of review.

3. This petition for Writ of Certiorari should be granted because the character of reasons for granting the same falls

squarely within the purvue of this Honorable Court's Rule 19. The Court below has decided a Federal question of substance with respect to whether Petitioner may be found guilty of an unfair labor practice without being afforded any proper hearing and such question has not been determined by this Court. The decision of the Court below conflicts with a prior decision of this Court with respect to the standard of review which is to be utilized in determining whether to enforce an order of the Board. Petitioner further submits that in denying Petitioner due process of law, by refusing to afford Petitioner a proper hearing before finding it guilty of an unfair labor practice, the Court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Honorable Court's power of supervision.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Fritz Lanham Lyne

Fritz Lanham Lyne

CERTIFICATE OF SERVICE

I, FRITZ LANHAM LYNE, attorney for Petitioner, certify that on this the 6th day of December, 1969, pursuant to Rule 33, Supreme Court Rules and in full compliance therewith, a copy of the above and foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was mailed to The Solicitor General, Department of Justice, Washington 25, D. C., Marcell Mallet-Prevost, National Labor Relations Board, 1717 Pennsylvania Avenue, N. W., Washington, D. C., Mr. Richard F. Watt, Cotton, Watt, Jones & King, Attorneys at Law, 105 Adams Street, Chicago, Illinois; Mr. T. Lowrey Whittaker, Room AA 24, Federal Office Building, 819 Taylor Street, Fort Worth, Texas; Honorable Elmer Davis, Regional Director, National Labor Relations Board, Room AA 24, Federal Office Building, 819 Taylor Street, Fort Worth, Texas, by depositing said copies in the United States mail, properly addressed, first class postage prepaid, certified return receipt requested, and the foregoing briefs mailed to The Solicitor General, Marcel Mallet-Prevost and Richard F. Watt were mailed via air mail, postage prepaid.

Fritz Lanham Lyne

Fritz Lanham Lyne

APPENDIX A

Sec. 3(b), Labor Management Relations Act, 1947 (29 U.S.C. Sec. 153)

> (b) The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 159 of this title to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 159 of this title and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

Sec. 9(c) (1), Labor Management Relations Act, 1947 (29 U.S.C. Sec. 159)

> (c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
>
> > (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their repre-

sentative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section: or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section:

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

Sec. 10(b), (e) and (f), Labor Management Relations Act, 1947, (29 U.S.C., Sec. 160)

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charge in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, , not less than five days after serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from

the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substan-

tial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner

as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Government Organization and Employees Act Sec. 554 (5 U.S.C., Sec. 554)

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

(1) a matter of subject to a subsequent trial of the law and the facts de novo in a court:

(2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title:

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceedings shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceedings, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as

witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

Government Organization and Employees Act Sec. 556 (5 U.S.C., Sec. 556)

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with Section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

(1) administer oaths and affirmations;

(2) issue subpoenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplication of the issues by consent of the parties;

(7) dispose of procedural requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) take other action authorized by agency rules consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties when an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

Government Organization and Employees Act Sec. 706 (5 U.S.C., Sec. 706)

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

in making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

APPENDIX B

In the

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 25783

THE RIVERSIDE PRESS, INC.,

Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition to Review an Order of the National Labor Relations Board (Texas Case)

(June 17, 1969)

Before ALDRICH,* GODBOLD and DYER, Circuit Judges.

ALDRICH, Circuit Judge: An employer, Riverside Press, Inc., brings this petition to set aside a section 8 (a) (5) and (1) order of the National Labor Relations Board based upon an admitted failure to bargain with a union.[1] The company's position is that the Board certification of the election of the union was improper, an issue on which it could obtain court review only

*Of the First Circuit, sitting by designation.

1. Local 267, Dallas-Fort Worth Lithographers and Photoengravers International Union, AFL-CIO.

by refusing to bargain and awaiting an unfair labor practice charge. *Cf. Boire v. Greyhound Corp.*, 1964, 376 U.S. 473.[2] At the unfair labor practice stage it sought to try one of the factual issues of the certification de novo, only to find that the Board would not permit it. The propriety of this ruling is the sole question before us.

To begin at the beginning, the union filed a representation petition, after which the regional director conducted the customary pre-election hearing, determined the appropriate unit and ordered an election. The union won by a vote of 26 to 22, but only by virtue of challenging the validity of four ballots, all of which were against the union, claiming the voters to be ineligible supervisors. The company objected to the union's right to challenge, asserting that the supervisory status of all the voters was conclusively "litigated" in the pre-election hearing and could not be relitigated after the election.[3] However, it requested a post-election hearing if the regional director disagreed with its view of the conclusiveness of the pre-election determination. The regional director, after an ex parte investigation, determined that two of the ballots should be counted, and ordered a hearing to determine the status of the others, Wiley and Schilling. This was within his discretion under NLRB Rules and Regulations, 29 C.F.R. § 102.69 (c).[4] After an extensive

2. The reason for this of course, as *Boire* pointed out, is to deter delaying action in the courts.

3. If developed, this issue might have raised questions, but it has not been.

4. "[T]he regional director may (1) issue a report on objections or challenged ballots, or both,. . .or (2) exercise his authority to decide the case and issue a decision disposing of the issues and directing appropriate action or certifying the results of the election. In either instance, such action by the regional director may be on the basis of an administrative investigation or, if it apperas to the regional director that substantial and material factual issues exist which can be resolved only after a hearing, he shall issue and cause to be served on the parties a notice of hearing on said issues before a hearing officer."

hearing the hearing officer recommended that both ballots remain uncounted. The regional director did not adopt the recommendation as to Wiley, but did as to Schilling, and therefore certified the union. Review by the Board was denied.

When the company refused to recognize it the union filed charges instituting an unfair labor practice proceeding. At these proceedings counsel for the General Counsel rested upon the election and certification of the union and the company's admitted refusal. The company's response was to request a de novo hearing on teh supervisory status of Schilling. It did not seek to offer additional evidence, newly discovered or otherwise, *cf. NLRB v. Air Control Prods.*, 5 Cir., 1964, 335 F. 2d 245, 251, or try to persuade the trial examiner in effect to review the prior decision to determine if it was legally erroneous or factually unsupported, *cf. NLRB v. Southbridge Sheet Metal Works, Inc.*, 1 Cir., 1967, 380 F. 2d 851, 854, & n. 2; *Pepsi-Cola Buffalo Bottling Co. v. NLRB, 2 Cir.*, March 25, 1969. The company's only argument was that before it could be found guilty of an unfair labor practice it was entitled to a complete new hearing upon Schilling's status as of right under section 10 (b), 29 U.S.C. § 160 (b). The trial examiner disagreed, and refused to conduct a hearing upon this issue, concluding that it had been fully litigated in the post-election hearing. With no other issues in dispute, the impropriety of the company's refusal to bargain followed as a matter of course. The Board affirmed.

The company raises, basically, three criticisms of the Board's ruling. The most basic one, that objections to the representation election may not be resolved in post-election hearings, need not

detain us. This claim was not only untimely made, *see Magnesium Casting Co. v. Hoban*, 1 Cir., 1968, 401 F. 2d 516, *cert. denied 393 U.S. 10655*[5] but frivolous in the light of the Board's wide discretion in fulfilling its section 9 (c) function of certifying election results. *Cf. NLRB v. A. J. Tower Co.*, 1946, 329 U.S. 324. Such hearings have long been held. It is not necessary that they be specifically provided for in the statute.

Secondly, the company argues that even if the Board can hold such hearings, no resolution of any issue in such should be binding in any subsequent unfair labor practice proceedings. Initially it points to the disparity in terms of procedural safeguards between the unfair labor practice hearings and the representational hearings – both pre- and post-election. Whereas in the unfair labor practice hearings a trial examiner presides[6] and the rules of evidence developed in the courts are controlling "so far as practicable,"[7] in both representational hearings a hearing officer presides[8] and the judicial rules of evidence are not controlling.[9] In view of the "so far as practicable" language of section 10 (b) and the representational nature of the issue involved in the post-election hearing in this case, we shall abide by the long line of cases that have found the representational determinations to be binding in a later unfair labor practice

5. The company contends that it was obliged to invoke the rule calling for post-election hearings, even though it disputed its validity, or it would be charged with failure to exhaust its administrative remedies. *Cf. NLRB v. Rexall Chem Co.*, 1 Cir., 1967, 370 F. 2d 363. But if the rule was void, recourse thereto could not be held necessary. It is also too late to contend that the post-election hearings were not exempted by 5 U.S.C. § 554(a) (6) from the safeguards of the Administrative Procedure Act.

6. NLRB Rules and Regulations, 29 C.F.R. § 102.34.

7. National Labor Relations Act § 10(b), 29 U.S.C. § 160(b).

8. NLRB Rules and Regulations, 29 C.F.R. § § 102.64, 102.69(d).

9. NLRB Rules and Regulations, 29 C.F.R. § § 102.66, 102.69(d).

proceeding. See *NLRB v. Air Control Prods.*, 5 Cir., 1964, 335 F. 2d 245; *NLRB v. Douglas County Elec. Membership Corp.*, 5 Cir., 1966, 358 F. 2d 125. There is no reason to distinguish post-election hearings from those held earlier, unless it were contended that the later hearings dealt with issues largely related to conduct which could form the basis for an unfair labor practice charge and only incidental to the question of the proper representation, a distinction we will return to. As the court in *Air Control Prods., supra* at 251, stated, "We are not dealing with objections to the manner in which the election (or election campaign) is conducted or those in which election activities constitute unfair labor practices." Nor do we accept the company's objection to the Board's rule, 29 C.F.R. § 102.69 (d), which in effect denies the applicability to post-election hearings of the prohibition of section 9 (c) (1), 29 U.S.C. § 159 (c) (1), against the acceptance of hearing officer's recommendations in pre-election proceedings. The restriction in section 9 (c) (1) on the powers of hearing officers seems to have been part of a general reform in 1947 to separate prosecutorial and adjudicative functions of the Board. "Presumably, the purpose is to isolate the Board members from the Board agents, who conduct the representation investigations . . ."[10] We are persuaded by the Board's contention that while it still formally complies with the section 9 (c) (1) restriction in pre-election cases, the addition of section 3 (b), 29 U.S.C. § 153 (b), in 1959 and the subsequent delegation of the Board's powers in

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10. Senate Minority Report on S.1126, S.Rep. No. 105, pt. 2, 80th Cong., 1st Sess., at 33 (1947), reprinted in U. S. Govt. Printing Office, Legislative History of the Labor Management Relations Act, 1947, at 495 (1948). But if, as Judge Friendly pointed out in *Utica Mut. Ins. Co. v. Vincent*, 1 Cir., 1967, 375 F. 2d 129, 133 N.6, *cert. denied*, 389 U.S. 839, the restriction was only to speed up the pre-election procedure, it is clearly not a requirement in post-election proceedings.

representational proceedings to the regional directors, with a limited discretionary appeal to the Board, virtually nullifies the insulating effect of section 9 (c) (1), and therefore the Board need not apply a dead letter law to post-election hearings, where it does not literally apply. The regional director is not the neutral adjudicator that Board members are presumed to be, since he partakes in the prosecutorial functions. *See McLeod v. Teamsters Local 239*, 2 Cir., 1964, 330 F. 2d 108; NLRB Rules and Regulations, 29 C.F.R. §§ 101.5 – .8, 102.14 – .19. Therefore, the majority of representation decisions are made solely by an official not strictly neutral; moreover, when decisions are granted appeal by the Board, they come with the recommendations of this subordinate.[11] Finally, the Board could hardly be prevented from instituting a procedure which is probably fairer, and which, it has been contended, is a requirement of due process under *Morgan v. United States*, 1936, 298 U.S. 468. *See Utica Mut. Ins. Co. v. Vincent*, 2 Cir., 1967, 375 F. 2d 129, *cert. denied*, 389 U.S. 839 (Friendly, J.) rejecting as frivolous argument that nonrecommendation provision of section 9 (c) (1) is unconstitutional), noted in 14 Wayne L.R. 617 (1968).

The company's third major claim is that even if some issues decided in the representational proceedings may be binding in a subsequent unfair labor practice proceeding, the recent cases, *Heights Funeral Home, Inc. v. NLRB*, 5 Cir., 1967, 385 F. 2d 879, and *Amalgamated Clothing Workers v. NLRB*, D.C. Cir., 1966, 365 F. 2d 898, hold that the issue of "supervisory status" of any employee must be relitigated. This is a misconception.

11. The hearing officer, moreover, "may submit an analysis of the record to the regional director or the Board. . . ." NLRB Rules and Regulations, 29 C.F.R. § 102.66(f).

These cases allow relitigation only when the subsequent unfair labor practice is "unrelated" to the prior election proceeding; for example, interference with organizational rights by supervisors, or the discharge of an employee allegedly a supervisor. But in *Amalgamated Clothing Workers* the court specifically noted, "Where a company is charged with refusal to bargain with a union certified after election, the proceeding is sufficiently 'related' to the representation proceeding to preclude relitigation of such common issues as the scope of the appropriate unit and *employees therein.*" 365 F. 2d at 904. (Emphasis added.) The issue is one of fairness: was the particular point that arises in the unfair labor practice proceeding significant and actually contested at the prior hearing, and was it clearly focused in terms of the issue arising in the later unfair labor practice charge. In the present case the supervisory status of Schilling was the key issue in the post-election hearing, was vigorously contested, and was focused in terms of the validity of the union victory. The overlap, in other words, was precise.

This is not to say that the company could not have raised before us the issue of the adequacy of the evidence to support the regional director's conclusion that Schilling had supervisory status. To return to *Boire v. Greyhound, supra,* it cannot be put in a position where it could never have such a determination. The company, however, though preserving its rights to raise such issues by objecting before the NLRB,[12] did not choose to press them before us, either by brief or oral argument. So far as

12. We make this concession rather than debate it. Actually, the exceptions which the employer took from the trial examiner's unfair labor practice hearing, as distinguished from those taken from the post-election hearing examiner's hearing, are broad and fail to specify this point.

its petition to review and set aside is concerned, this was a waiver.

However, so far as the Board's cross-petition for enforcement is concerned, possibly we should take a cursory look at the adequacy of the Board's findings to support its order, on the assumption that the special statutory basis for the Court's decision in *NLRB v. Ochoa Fertilizer Corp.*, 1961, 368 U.S. 318, is not present here, leaving a burden of sorts upon the Board in spite of the employer's lack of argument. *Cf. NLRB v. Local 111, United Carpenters,* 1 Cir., 1960, 278 F. 2d 823, 825; *NLRB v. Filtren Co.*, 2 Cir., 1962, 309 F. 2d 184; *NLRB v. Kellburn Mfg. Co.*, 2 Cir., 1945, 149 F. 2d 686. *But cf. NLRB v. National Mineral Co.*, 7 Cir., 1943, 134 F. 2d 424, 425, *cert. denied* 320 U.S. 753. Such a look would give us no qualms in enforcing the order. *NLRB v. Gary Aircraft Corp.*, 5 Cir., 1966, 368 F. 2d 223, *cert denied* 387 U.S. 918, *Brewton Fashions, Inc. v. NLRB*, 5 Cir., 1966, 361 F. 2d 8, *cert. denied* 385 U.S. 842; *NLRB v. Swift & Co.*, 1 Cir., 1961, 292 F. 2d 561.

However, this is the most we have to do. The matter was well put in the concurring opinion in *NLRB v. Red Spot Elec. Co.*, 9 Cir., 1951, 191 F. 2d 697, at 699.

> I approve the judgment of the court as announced in the majority opinion, and agree that upon a petition of this kind we should carefully examine the record for the purpose of determining that the Board had jurisdiction to make its order and that it has not "traveled outside the orbit of its authority". Such procedure is in conformity with the ancient practice of courts of equity when asked to enter a default decree.

> With respect to other matters stated or suggested by the opinion, I do not think that the rule of National Labor Relations Board v. Cheney California Lumber Co., 327 U.S. 385, 66 S.Ct. 553, 90 L.Ed. 739, has been modified either by the language of the statute or by anything said in Universal Camera Corp. v. Labor Board, 340 U.S. 474, 71 S.Ct. 456, or in Labor Board v. Pittsburg SS. Co., 340 U.S. 498, 71 S.Ct. 453. The language of § 10 (e) of the Act quoted and relied upon in the Cheney Lumber Company case has not been changed in the later Act.

In a subsequent case the Ninth Circuit cited this concurrence with approval. *F.P.C. v. Arizona Edison Co.*, 9 Cir., 1952, 194 F. 2d 679, 685. Clearly the court must be satisfied that the Board had jurisdiction. However, *Ochoa Fertilizer Corp., supra,* itself would seem to have put to rest any concept that the enforcing court, qua court, has a substantive interest in the correctness of the decision underlying the order, or, to quote our Brother Godbold's dissent, "whether in the interest of the national policies represented by the Congressional labor enactments. . .the court should enforce the order." No doubt the court, qua court, owes a duty to itself to ascertain that the form of the order is such that enforcement would be practicable, but beyond that we are not persuaded that a respondent cannot lose a valid point by waiver any less than *Ochoa* held it could by consent.

The order will be enforced.

GODBOLD, Circuit Judge, dissenting:

I differ with the majority on two grounds. In my opinion they employ an erroneous standard of review when they take

only a "cursory look" at the record as a whole. And, when the record is scrutinized under the appropriate standard of review, it does not support enforcement of the Board order.

I concur with my brothers that, although the employer adequately preserved the supervisory issue during each step of the agency proceedings,[1] it failed to assert that question in brief or oral argument on its petition to review pursuant to § 10 (f).[1A] Moreover, I agree with the rejection of the employer's novel procedural attack on post-election hearings.[2]

I. The Standard of Review

This case comes before us under two separate and district statutory provisions. Pursuant to § 10 (f),[3] the company petitioned this court to review and set aside the order of the

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1. We are not faced with the orthodox bar to judicial review imposed, in the absence of "extraordinary circumstances," by § 10(e) to objections not raised before the Board (and hence outside the record on review). See 3 CCH Lab. Law. Rep. ¶ 6015.67; *cf.* Texaco, Inc. v. NLRB, 5 Cir. 1969, F. 2d [Mp; 25502, Mar. 3, 1969 slip op. at 6-8] (intervenor claim not raised before Board rejected).

1A. The petition to set aside alleges that the order is not supported by substantial evidence on the record as a whole. But this assertion is not, without brief or argument, sufficient to present that contention for § 10(f) review.

2. Any other position would conflict with the provisions of 29 C.F.R. § 102.69(c), and with recent decision of this Court establishing the test for determining when an objecting or challenging party in a representation case has a right to a postelection hearing – where "substantial and material factual issues" are controverted. *See* NLRB v. Smith Industries, Inc. 5 Cir. 1968, 403 F. 2d 889, 892 n. 5, 6. *See also* Southwestern Portland Cement Co. v. NLRB, 5 Cir. 1969, 407 F. 2d 131 [No. 25791, Feb. 10, 1969]; NLRB v. Genesco, Inc., 5 Cir. 1969, 406 F. 2d 393 [No. 25592, Jan. 7, 1969].

3. 29 U.S.C.A. § 160(f):

"Review of final order of Board on petition to court

"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United State Court of Appeals for the District of Columbia, by filing in such a

(cont'd. on next page)

Board. the NLRB filed in one document its answer to the company's § 10 (f) petition and its cross-petition to enforce pursuant to § 10 (e).[4] Therein it said "that the proceedings had before it, the *findings of fact, conclusions of law,* and order of the Board *were and are in all respects valid and proper* under the National Labor Relations Act, as amended . . . .," and it asked this court to enforce its order. (Emphasis added). While all members of the panel agree that the employer waives its § 10 (f) rights by failing to press the supervisory issue before this court, we differ on the Board's right to enforcement under

(cont'd. from preceding page)

court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

4. 29 U.S.C.A. § 160(e):

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . ."

§ 10 (e) and on the standard which we are required to emplo in determining if such a right exists in this case.

In my view the majority standard of a "cursory look" at the record is insufficient. More than that is required for the court to put its judicial imprimatur on the enforcement of a Board order. In reaching that conclusion I consider the express statutory language adopted by Congress after heated debate over the defects of the pre-Taft-Hartley evidentiary standard and the tendency of some appellate courts to rubber stamp Board orders out of deference to adminstrative expertise, and also the Supreme Court's elaborate indorsement of the purpose of the amended standard in *Universal Camera Corp. v. NLRB;* 1951, 340 U.S. 474, 95 L.Ed. 456.

There can be no argument over what the statute says. The problem is whether it is or is not, to be given application in the particular situation before us. *Universal Camera* amply explained the congressional purpose, and I must note several of its observations. That case came about by the intercircuit conflict in interpretation of the effect of the Taft-Hartley Act Amendments (1947) on the reviewing power of the courts.[5] The Wagner Act had provided that the findings of the Board as to facts, if supported by the evidence, were conclusive. The Supreme Court thereafter had read "evidence" to mean "substantial evidence."[6] The courts had found the Board's burden satisfied under the Wagner standard if the results were supported by the substantial evidence viewed in isolation. From the resulting Congressional outrage came the "substantial

5. 340 U.S. at 476 n. 1, 95 L.Ed. at 461 n. 1 and accompanying text.
6. 340 U.S. at 477, 95 L.Ed. 462.

evidence on the record considered as a whole" test, which ultimately became the Taft-Hartley standard.[7]

Against this background the Supreme Court said that "Congress has left no room for doubt as to the kind of scrutiny which a court of appeals must give the record before the Board to satisfy itself that the Board's order rests on adequate proof."[8]

After carefully examining the legislative history of the Taft-Hartley Amendments, the Supreme Court set out the language so often paraphrased as the *Universal Camera* standard:

> To be sure, the requirement for canvassing "the whole record" in order to ascertain substantiality does not furnish a calculus of value by which a reviewing court can assess the evidence. Nor was it intended to negative the function of the Labor Board as one of thos agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. Nor does it mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*. Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision *when it cannot conscientiously find that*

7. 340 U.S. at 477-483, 484 n. 17, 95 L.Ed. at 461-465, 465 n. 17 and accompanying text; 340 U.S. at 485 n. 21. 95 L.Ed. at 466 n. 21.

8. 340 U.S. at 487, 95 L.Ed at 467.

> *the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.* (emphasis added)

340 U.S. at 488, 95 L.Ed. at 467-468. *Accord: J. H. Rutter-Rex Mfg. Co. v. NLRB*, 5 cir. 1968, 399 F. 2d 356, 359-360, *cert. granted* 37 U.S.L.W. 3322 (U.S. Mar. 3, 1969) (No. 925); *NLRB v. Brown & Root, Inc.*, 8 Cir. 1963, 311 F. 2d 447, 451. *See generally* 3 CCH Lab. Law Rep. ¶ 6025 (examining conclusiveness of Board findings under Taft-Hartley (.22) and former Wagner Act tests (.82)).

I am of the opinion that Congress, by repeating the same substantiality standard in both § 10 (e) and § 10 (f), insured that the mutually exclusive enforcement and review provisions[9] would apply the same sufficiency test. The Taft-Hartley Act nowhere intimates any Board right to enforcement except upon satisfaction of the substantiality standard.

The role of the enforcing court in pre-Taft-Hartley days was described by the Second Circuit in *NLRB v. Kellburn Mfg. Co., Inc.*, 2 Cir. 1945, 149 F. 2d 686:

> As is well understood, an enforcement proceeding is therefore, a combination of an appeal from the order, and a motion to enforce it. In its first aspect, i.e., as an appeal,

9. The review provisions are mutually exclusive not by virtue of the standard of review, but by differing rights of respective parties seeking to invoke the jurisdiction and equitable power of the appellate court. An aggrieved party triggers the review procedure only through § 10(f) with the Board cast in the role of respondent. The Board seeks enforcement under § 10(e) with the aggrieved party, if he has not petitioned under § 10(f), the respondent. Upon the filing of either a § 10(e) or § 10(f) petition, the court is required to apply the same standard of review. Under either section the Board's order must withstand the same standard or it is subject to being modified or set aside in whole or in part.

we think that it rests upon the respondent to show at least that the findings have no substantial support in evidence; and, if so, it follows that when, as here the respondent defaults, it is not necessary to make that examination. We are called upon therefore to go no further than to examine the findings, decide whether they support the order, and whether the order itself is in accordance with the statute.

In a post-Taft-Hartley case[9A] the Seventh Circuit, relying on *Kellburn,* and without consideration of the effect of the 1947 amendments and *Universal Camera,* restated the idea that in an enforcement proceeding the burden is on the respondent to show want of substantial evidence, and that the default of the employer before the enforcing court operates as a confession of the allegations of the enforcement petition, so that all the court then need do is to see if the findings support the order and whether the order complies with the statute, issues on which the Board has the burden of proof.

But power of the court to enforce a Board order is statutory. Once Congress has written into the statute a standard of review the court cannot give itself power to enforce under a lesser standard, articulated for procedural efficiency and expedition.[10]

9A. NLRB v. Wagner Iron Works, 7 Cir. 1955, 220 F. 2d 126. *See also* NLRB v. Flora Construction Company, 10 Cir. 1962, 311 F. 2d 310.

10. This court has only recently reiterated the standard for appellate review of representation cases under the NLRA, holding:

> "While a representation proceeding alone would not be subject to direct review by this Court, where an unfair labor practice is charged for refusal to bargain, and the employer has refused to recognize the certification, the election proceeding is properly here. *Under those circumstances, the representation case and the unfair labor practice case become one, and the complete record is fully reviewable.* NLRB v. Tampa Crown Distributors, Inc., 272 F. 2d 470 (5th Cir. 1959). See also: NLRB v. Genesco, F. 2d (5th Cir.

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The majority rely upon a line of cases predicated upon *NLRB v. Cheney Lumber Co.*, 1946, 327 U.S. 385, 90 L.Ed. 739. *Cheney* is inapposite. It involved a clear default in the agency proceedings. The employer in *Cheney* simply failed to file exceptions to the Trial Examiner's intermediate report and failed to request oral argument before the Board. 327 U.S. at 386. The Supreme Court merely invoked the orthodox § 10 (e) statutory prohibition[11] against judicial examination of an issue not raised before the Board. 327 U.S. at 388-389.[12] The employee *sub judice* has vigorously protested the supervisory issue in all agency proceedings. The § 10 (e) prohibition has no application.

In *NLRB v. Local 111, United Carpenters*, 1st Cir. 1960, 278 F. 2d 823, 825 Judge Aldrich writing for the First Circuit, set out what seems to me correct:

> Any order entered following a decision by the Board is, of course, the court's order, and not that of the Board. In this respect the matter differs from an appeal from a district court. We are correspondingly more concerned

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1969) (No. 25592, January 7). In order to arrive at a decision in this matter, *we must consider the record to determine* whether the Board's certification of the Union, and consequent finding of an unfair labor practice by petitioner, *were based on facts supported by substantial evidence and on the application of correct legal standards.* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951)."

Electra Mfg. Co. v. NLRB, 5 Cir. 1969, F. 2d [No. 25638, Feb. 26, 1969, slip op. at 4-5] (Emphasis added).

11. 29 U.S.C. § 160 (e) 1964):

"No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

See NLRB v. Int'l Union of Operating Eng., Local 66, 3 Cir. 1966, 357 F. 2d 841, 843-844 and cases cited therein; *see* generally 3 CCH Lab. Law Rep. § 6015.67.

12. Also *Cheney* antedated both the Taft-Hartley Amendments and *Universal Camera*.

> with the content of the order. For if, on default, we must automatically enter any order prepared by the Board Congress would in effect be giving to an administrative board the final word in the formulation of our injunctions. We recognize no such power, even if it could be thought that there was such an intent.

278 F. 2d at 825. Then he departed from that to say that "full scrutiny need not be accorded a party who has failed to diligently preserve and prosecute his Section 10 (f) rights." But the inquiry is whether in the interest of the national policies represented by the Congressional labor enactments, including the 1947 Amendments, the court should enforce the order. The less than full scrutiny standard of *Local 111*, in effect a penalty against a nondiligent employer and a reward to the Board, is simply not allowed by § 10 (e).[13] Moreover *Cheney* does not stand for such a rule. *NLRB v. Filtron, Inc., 2 Cir. 1962, 309 F. 2d 184, 185 is a per curiam adoption of the rationale of Local 111* and also relies on *Cheney*. *NLRB v. Kellburn Mfg. Co., Inc., supra,* and *NLRB v. National Minerals Co.*, 7 Cir. 1943, 134 F. 2d 24, 425-26, *cert. denied* 320 U.S. 753, antedate *Taft-Hartley* and *Universal Camera.*[14] The presumption of correctness

13. Of course, the court can keep its own house in order. It can decline to grant enforcement, for default of the Board in failing to press an enforcement petition. But this does not answer whether the court can grant affirmative relief in favor of the Board without determining if there is evidence to support it.

14. I agree with the language of the majority in NLRB v. Red Spot Electric Co., 191 F. 2d 697 (9th Cir. 1951):

> "In any event, it has now been held that the amendments of the Act required a stricter rule of construction than hitherto and that the courts have a much broader sphere of action in determining what orders are to be enforced. Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 71 S. Ct. 456; National Labor Relations Board v. Pittsburg Steamship Co., 340 U.S. 498, 71 S.Ct. 453.
>
> "Therefore, simply because the power of a party in default to take action as of right may have been delimited by Congress, there is no intimation that

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attending the proceedings of administrative agencies cannot dispense with or water down the standard of review specifically established by Congress for enforcment of Board orders.

I would review the Hearing Officer's report[15] under the *Universal Camera* - § 10 (e) test.[16]

II

The Substantiality of the Evidence

The Hearing Officer, appointed by the Regional Director to conduct the post-election hearing to determine the supervisory

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(cont'd. from preceding page)

the power of judicial scrutiny was destroyed when the Board came as suitors praying sanctions upon a report, neither the entry nor the contents of which has been considered by them. As a result, summary enforcement has been denied."

In *Red Spot*, pursuant to 29 U.S.C.A. § 160(c) and the Board's regulation, 29 C.F.R. § 101.12 and 102.48, the Board automatically adopted the trial examiner's report because the employer did not file exceptions to the report. The court held it would not grant summary enforcement without examining the record. The First Circuit declined to follow *Red Spot* in NLRB v. Auburn Curtain Co., Inc., 1 Cir. 1951, 193 F. 2d 826. *Red Spot* was concerned with the *Cheney* problem – the effect of default in the agency proceedings – and the disclaimer of it in *Auburn Curtain* correctly points out that it is inconsistent with *Cheney*. See also NLRB v. Int'l Union of Operating Eng. Local 66, *supra*, 357 F. 2d at 846 n. 10. But none of this has to do with the scope of review in a case such as is before us where there has been no default in the agency proceedings and hence no scope of action for the statutory prohibition of § 10(e).

15. The Board effectively rubber-stamped the Hearing Officer's report and its findings as to Schilling's supervisory status when it denied review of the Regional Director's decision adopting the report foreclosing any relief in the § 9 representation proceeding; by adoption without a hearing of its Trial Examiner's decision in the unfair labor practice case, including his invocation of the no-relitigation rule (29 C.F.R. § 102.67(c), the Board effectively foreclosed any relief in the § 10 proceeding.

16. If the majority conclusion, based on *Cheney*, is otherwise correct we still should apply the "extraordinary circumstances exception to the § 10(e) review prohibition. Cf. NLRB v. Spiewak, 3 Cir. 1950, 179 F. 2d 695. In the instant case the § 10 order is wholly conditional upon the validity of the § 9 finding. To enforce the former without careful scrutiny of the latter in accordance with the substantial evidence test may result in a certification and bargaining order being forced by judicial abdication upon less than a majority of the employees whose rights are paramount. *See* NLRA, Sections 7 and 9(a), 29 U.S.C. §§ 157 and 159(a) (1964). Judicial enforcement was made an integral part of the statutory scheme to assure protection of employee rights guaranteed under the Act, not to insure either employer or union success.

status of Schilling and Wiley, adopted as his legal guide to § 2 (11) *NLRB v. Beaver Meadow Creamery, Inc.*, 3 Cir. 1954, 215 F. 2d 247, 251. He concluded that *Beaver Meadow Creamery* held that "the term supervisor is to be read disjunctively and that the possession of any one of the Section 2 (11) powers will make one a supervisor."

According to the Hearing Officer, (1) Schilling's shift overlapped the other two shifts, (2) he was announced as "foreman" sometime in early Spring by Lunt, *the department supervisor*, (3) he subsequently received a 25 to 75 cent an hour pay raise, although it was expressly found that no discussion ever followed with respect to his duties, responsibilities, or authority, (4) he "gives employees the work, checks the negatives before they make their plates, and looks at the plates after they make them" (5) the order of jobs is given to Schilling by Lunt, whose presence in the department varies from none to 20-30 times a day, (6) Schilling tells men which jobs to do, including occasionally writing instructions for the night shift on a blackboard when Lunt does not do so, (7) he confers with the lithographic department supervisor on approximately 90 percent of the plate quality control problems, and (8) he checked on several occasions time card entries made by department employees and notified them of mistakes made.

On the other hand, the Hearing Officer also made three other important findings, best set out in his own language:

> Lunt, *the admitted supervisor of the department,* is not a plate maker by trade, and has only a general knowledge of the plate making techniques. It appears from the record that Lunt is responsible for the over-all supervision of the department or section, but that internally the method of operation is left up to Schilling who has the technical knowledge necessary for the making of plates. (emphasis added).
>
> * * *
>
> Testimony reflects that those considered by the Employer to be supervisors are salaried while both Schilling and Wiley are hourly paid as are other hourly employees. Other supervisors are rated on an annual basis, while Schilling and Wiley are rated on a semi-annual basis as are other hourly rated employees. Neither attends regularly scheduled supervisor meetings as do the admitted supervisors.[17]
>
> * * *
>
> It is clear from the record that neither Schilling nor Wiley has the authority to hire, fire, promote, discipline, suspend, lay off, recall, discharge, or reward their employees or to effectively recommend such action.

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17. In an elaborate footnote, the Regional Director set out the company's supervisory hierarchy in his Decision and Direction of Election pursuant to § 9(c). (R.9n.2). In fact, he adopted the organizational structure, with the exception of certain inspectors, stipulated by the parties. An *Excelsior* list of employees' names and addresses was also required, thereby clearly showing who should be considered eligible voters when the supervisory personnel are defined. *Cf.* Groendyke Transport, Inc. *v.* Davis, 5 Cir. 1969, ... F. 2d . . . . . [No. 26812, Jan. 2, 1969]. *Cert. applied for* 37 U.S.L.W. 3324; Wyman-Gordon Co. *v.* NLRB, 1 Cir. 1968, 397 F. 2d 394, cert. granted 37 U.S.L.W. 3177.

The Hearing Officer then framed the supervisory issue in a nutshell: "[T]he evidence does reflect that both of them [Schilling and Wiley] assign work and transfer employees from one assignment to another. The question is whether such actions are of a merely routine clerical nature or whether, in the exercise of this authority, they use independent judgment."

The Regional Director disagreed as to Wiley. But he adopted as his own decision the Hearing Officer's determination of Schilling's status, a finding rubber-stamped without review by the Board in both its representation and unfair labor practice capacities.[18]

This court has only recently held that § 2 (11), defining under the NLRA who constitutes a "supervisor," is a pragmatic test. In *Ross Porta-Plant, Inc. v. NLRB,* 5 Cir. 1968, 404 F. 2d 1180, 1182, the court noted that the definition required "actual authority effectively to direct others." The Court explained:

> By this we mean the type of authority which flows from management and tends to associate an individual with management.
>
> In enacting § 2 (11) of the Act Congress did not intend to exclude from its protection any individuals except those who possess true managerial powers. This section is designed to apply to supervisors with genuine management prerogatives as distinguished from "straw bosses, leadmen, set-up men, and other minor supervisory employees." S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., p. 4. The company's designation of these employees as "department

18. *See* note 10, *supra.*

> heads," "assistant foremen" or "foremen" is not controlling in the absence of delegation to them of bona fide managerial powers.

404 F. 2d at 1182. *See NLRB v. American Mfg. Co. of Texas*, 5 Cir. 1968, 405 F. 2d 473, 474 (per curiam); *NLRB v. Security Guard Service, Inc.*, 5 Cir. 1967, 384 F. 2d 143, 149. *See generally* 1 CCH Lab. Law Rep. ¶ 1675.11 and ¶ 1675.147 (duties not title determine supervisory status).

The Hearing Officer's overly restrictive reliance upon *Beaver Meadow Creamery* resulted in his determination that Schilling's functions as the top plate maker and right hand man for Lunt, the non-craftsman supervisor, made Schilling a supervisor, notwithstanding the finding that Schilling lacked all of the indicia of supervisory status possessed by the recognized company hierarchy. Substantial evidence on the record considered as a whole fails to show that Schilling was anything more than a "lead man" or "straw boss". I would deny enforcement.

B-23

SEP 12 1969

In The

UNITED STATES COURT OF APPEALS

For The Fifth Circuit

No. 25783

THE RIVERSIDE PRESS, INC.,

Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition to Review an Order of the National Labor Relations Board (Texas Case)

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(September 11, 1969)

Before ALDRICH,* GODBOLD and DYER, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on

*Of the First Circuit, sitting by designation.

the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 25783

U. S. Court of Appeals
FILED

JUL 11, 1969

Edward W. Wadsworth
Clerk

THE RIVERSIDE PRESS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

JUDGEMENT

Before: ALDRICH,* GODBOLD and DYER, Circuit Judges.

THIS CAUSE came on to be heard upon the petition of The Riverside Press, Inc., to review an order of the National Labor Relations Board issued against petitioner on February 8, 1968, and upon the Board's cross-petition for enforcement of its order. The Court heard argument of respective counsel on October 30 ,1968, and has considered the briefs and the transcript of record filed in this cause. On June 17, 1969, the Court, being fully advised in the premises, handed down its

decision granting enforcement of the Board's order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that The Riverside Press, Inc., its officers, agents, successors, and assigns abide by and perform the directions of the Board in said order contained.

ENTERED: JUL 11 1969

* Of the First Circuit, sitting by designation.

A true copy
Dist. Clerk, EDWARD W. WADSWORTH
U. S. Court of Appeals 11th Circuit

By /s/ Rosalie Aument
Deputy

New Orleans, Louisiana SEP 19 1969

B-26

In The

UNITED STATES COURT OF APPEALS

For The

Fifth Circuit.

U. S. Court of Appeals
FILED

OCT 3 1969

Edward W. Wadsworth
Clerk

No. 25783

THE RIVERSIDE PRESS, INC.,

Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition to Review an Order of the National Labor Relations Board. (Texas Case)

Before ALDRICH*, GODBOLD and DYER, Circuit Judges.

ON CONSIDERATION OF THE MOTION of petitioner for recall and stay of judgment issued as mandate in the above numbered and entitled cause, to enable petitioner to apply for and to obtain a writ of certiorari from the Supreme Court of the United States,

IT IS ORDERED that the judgment issued as mandate to the National Labor Relations Board at Washington, D. C., on

*Bailey Aldrich, Chief Judge of the First Circuit, sitting by designation.

September 19, 1969, be recalled and stayed to and including a date 30 days from the date of this order, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within said period there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition and record have been filed.

IT IS FURTHER ORDERED that the Clerk shall issue the judgment as mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the above period unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

United States of America
BEFORE THE NATIONAL LABOR
RELATIONS BOARD

Division of Trial Examiners
Washington, D. C.

Case No. 16-CA-3052

THE RIVERSIDE PRESS, INC.,

Respondent

and

LOCAL 267, DALLAS-FORT WORTH
LITHOGRAPHERS AND PHOTOENGRAVERS
INTERNATIONAL UNION,
AFL-CIO

Fritz L. Lyne, Esq., (Lyne, Klein & French),
Dallas, Texas, for the Respondent.

Robert L. Penrice, Esq., for the
General Counsel.

TRIAL EXAMINER'S DECISION

Statement of the Case

The Representation Proceeding[1]

CHARLES W. SCHNEIDER, Trial Examiner: On September 27, 1966, an election was conducted at the Dallas, Texas plant of the Riverside Press, Inc., herein called Respondent pursuant

1. Official notice is taken of the representation proceeding. Case No. 16-RC-4326.

to a Decision as to the appropriate unit[2] for purposes of collective bargaining within that unit and direction of election by the Regional Director for the 16th Region in Case no. 16-RC-4326, following a hearing on July 11, 1966 pursuant to Section 9 of the Act.[3]

At that time, of a unit of approximately 53 eligible voters, 26 votes were cast in favor of and 22 votes were cast against Local 267, Lithographers and Photoengravers International Union, AFL-CIO, herein called the Union. One ballot was voided; four ballots were challenged by the Union on the ground that the challenged voters were supervisors. The challenged ballots were sufficient in number to affect the results of the election.

Under date of September 30, 1966 counsel for the Respondent, by letter in the nature of a brief to the Regional Director, contended that the challenges should be overruled on the ground that the challenged voters were not supervisors. In support of this contention the Respondent argues that the record in the representation case "conclusively establish[es] that all matters relating to the supervisory hierarchy of the Employer were fully litigated [and determined] in the representation hearing." (pp. 2-3, 13). In this letter the Respondent further said that if the Regional Director disagreed with the Respondent's position as to the employee status of the challenged voters, " . . . the Employer requests that the Regional Director designate a hearing officer and schedule a hearing for

2. The appropriate unit was stated as follows:
All lithographic production employees employed at the Employer's Dallas, Texas, plant, excluding all other employees, inspectors, office clerical employees, guards, watchmen and supervisors as defined in the Act.

3. Respondent's request for review of the Regional Director's Decision and Direction of Election was denied by the Board on September 23, 1966, on the ground that it raised "no substantial issues warranting review."

the purpose of determining the status of the employees whose ballots were challenged." (p. 15)

By Supplemental Decision and Order issued on December 2, 1966, the Regional Director ruled that the challenged ballots of James Wood and Jasper Cacioppi were overruled on the basis that they were non-supervisors, and directed that those ballots be opened and counted. No exceptions were taken to that action. The Regional Director further opening the ballots of Wood and Cacioppi, a hearing should be held to determine the supervisory status of Marjorie Wiley and Andrew Schilling, the remaining two voters whose ballots were challenged. On December 12, 1966, the ballots of Wood and Cacioppi were opened, revising the talley to 26 votes cast for the Union, and 24 against, with 2 undetermined challenges which could affect the results of the election.

On January 10, 1967, the hearing on the two remaining challenges was conducted before a duly appointed hearing officer. In a memorandum to the hearing officer on January 21, 1967, the Respondent renewed its previous position to the effect that the supervisory status of Respondent's employees "was fully inquired into at the hearing herein of July 21, 1965 [sic] and under Board decisions it is not proper to bring the matter up again by way of challenged ballots." (p. 1) On February 9, 1967, the hearing officer issued his report on challenged ballots, finding that both Wiley and Schilling possessed supervisory status under the Act and recommended that the challenges to their ballots be sustained. To this report the Respondent filed exceptions under date of February 14, 1967 asserting that Schilling and Wiley were not supervisors,

again reiterating its position that the matter had already been litigated. (p. 2)

On April 5, 1967, a Second Supplemental Decision and Certification was issued by the Regional Director in which he sustained the challenge to Schilling's ballot but overruled the challenge to Wiley's ballot concluding that "it now appears that however Wiley cast her ballot it will not affect the results of the election, and it will not be necessary to open it." (p. 3) He then certified the Union as bargaining representative of the employees in the above-mentioned unit.

Under date of April 14, 1967 Respondent filed a Request for Review of the Regional Director's Second Supplemental Decision & Certification, and on May 16, 1967, the Board denied Respondent's request for review on the ground that it raised "no substantial issues warranting review." In its request for review the Respondent reiterated its position that in the representation hearing of July 11, 1966 "the supervisory status of all the employees of the Employer was fully litigated." (pp. 6,18).

The Complaint Case

On July 11, 1967. Norman C. Warnke, the Union's International representative, filed the unfair labor practice charge involved in the instant case in which he alleged that since on or about June 3, 1967, Respondent refused to bargain with the Union.

On August 16, 1967, the General Counsel, by the Regional Director of Region 16, issued a complaint alleging that since on or about June 3, 1967, Respondent had committed unfair labor practices in violation of Section 8(a) (1) and (5) and Section

2(6) and (7) of the Act by refusing to bargain with the Union upon request. In due course Respondent filed its answer to the complaint in which certain allegations of the complaint were admitted and others denied.

In its answer Respondent admitted most of the material allegations of the complaint including the facts of the representation proceedings recited above, but denied the following essential allegations of the complaint: (1) that the unit involved is appropriate, (2) that the Union has been designated and selected by the unit employees as, and is, their collective bargaining representative, (3) that Respondent violated Section 8(a) (1) and (5) and Section 2(6) and (7) of the Act, (4) that the acts of Respondent tend to lead to labor disputes burdening and obstructing commerce.

Thereafter counsel for the General Counsel filed Motion to Strike Portions of Respondent's Answer to Complaint and Motion for Judgment on the Pleadings on the ground that Respondent's answer raises no issue not already disposed of in the representation proceeding, and that the admissions contained in Respondent's answer establish the violations contained in the complaint as a matter of law.

On September 22, 1967, I issued an Order to Show Cause on the Motion to Strike Portions of the Answer and Motion for Judgment on the Pleadings, in which the parties were directed to show cause on or before October 11, 1967, as to whether or not the motions should be granted.

On October 10, 1967, Respondent filed a Response to the Order to Show Cause, and on October 12, 1967 counsel for the Union filed a brief in support of the motion for judgment on

the pleadings. The brief for the Union not having been filed within the prescribed time, it has been disregarded.

Commencing on or about April 5, 1967 and continuing to date and particularly on or about May 29, 1967 and July 1, 1967 the Union requested the Respondent to bargain collectively in the appropriate unit. Attachments to the General Counsel's motions whose authenticity is not contested establish that on June 3, 1967, in response to a letter from the Union to the Respondent dated May 29, 1967, counsel for the Respondent, on behalf of the Respondent, declined to meet with the Union for the purpose of collective bargaining on the ground that the Respondent was entitled to judicial review of the decision of the Board.

Ruling on Motions to Strike and Judgment on the Pleadings

The Respondent opposes the General Counsel's motions to strike and for judgment on the pleadings. The Respondent contends that the unit is inappropriate, that no proper hearing has been held, that the Regional Director erred in sustaining the challenge to Schillings' ballot, and that the certification is consequently invalid. The Respondent further contends that it is entitled to a hearing in the unfair labor practice case on the issue of the status of the challenged voters.

However, the issues as to the appropriateness of the unit, the merit of the Respondent's contentions as to the challenged votes, and whether the Union should be certified, were raised by Respondent in its request to review the Decision and Direction of Election, in its letter to the Regional Director of September 30, 1966, its memorandum to the hearing officer on

January 21, 1967, its exceptions to the hearing officer's report, under date of February 14, 1967, and in its request for review of April 14, 1967, and were decided by the Board in the Representation proceedings. It is thus clear that Respondent seeks to relitigate those issues here. This the Respondent may not do before the Trial Examiner.

It is established Board policy, in the absence of newly discovered or previously unavailable evidence, not to permit litigation before a Trial Examiner, in an unfair labor practice case, of issues which were or could have been litigated in a prior related representation proceeding.[4] Such a hearing is not a matter of right unless substantial and material issues are raised.[5] The Respondent contends that the issues are material and that they have not been litigated. That they are material is clear. The basic question is whether they have been litigated.

The Respondent's contentions in this regard as stated in its Response (pp. 5-12) are as follows: The proceeding before the hearing officer was not a valid hearing for the reason that such a hearing is not authorized by the National Labor Relations Act. There is no statutory authority vesting the Regional Director with authority to order a post-election hearing in a representation case concerning the supervisory status of challenged voters. Section 9(c) (1) of the Act authorizes a hearing in a

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4. *N.L.R.B. v. Macomb Pottery*, 376 F. 2d 450 (C.A. 7, 1967); *Howard Johnson Company*, 164 NLRB No. 121; *Metropolitan Life Insurance*, 163 NLRB No. 71. See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); NLRB Rules and Regulations, Sec. 102.67 (f).

5. *O.K. Van and Storage, Inc.*, 127 NLRB 1537, 297 F. 2d 74 (C.A. 5) And see *Air Control Window Products, Inc.*, 335 F. 2d 245, 249 (C.A. 5, 1964): "If there is nothing to hear, then a hearing is a senseless and useless formality." *Bata Shoe Co., Inc.*, 65 LRRM 2318 (C.A. 4, 1967); *Kansas Color Press*, 376 F. 2d 643 (C.A. 10, 1967). Cf. *U.S. Rubber Co.*, 373 F. 2d 602 (C.A. 5, 1967).

representation case only to determine whether a question of representation affecting commerce exists. But even if there were such authority the hearing officer may not make recommendations as to the disposition of the case because Section 9(c) (1) states that a hearing officer "shall not make any recommendations." Section 102.69 of the Board's rules, which provides for post-election hearings and recommendations thereon by the hearing officer, are therefore in contravention of the statute. Finally, the hearing which was held on the challenges was inadequate as a matter of law for the reason that in representation hearings the rules of evidence are not controlling (Rules 102.66), whereas unfair labor practice hearings are required by Section 10(b) of the Act to be conducted in accordance with the rules of evidence applicable in the district courts. It follows, the Respondent concludes, that the matter of the challenges was not litigated in the representation case and hearing before a Trial Examiner is now in order on that issue.

So far as I am aware these contentions are of first impression. I find them not sustained. Full opportunity was provided for litigation of all representation issues in the representation proceeding. Apart from that I find the questions not properly raised, and in any event without substance on the merits.

In the first place I believe the Respondent estopped from questioning the legality of the hearing on the challenges for the reason that the hearing was pursuant to the Respondent's request. In its letter of September 30, 1967 to the Regional Director, referred to above, the Respondent requested a hearing before a hearing officer to determine the challenge issues in the event the Regional Director disagreed with the Respondent's

views as to their disposition. Having urged such a hearing the Respondent may not now attach as invalid the decision to hold it. Such affirmative action, and additionally the Respondent's failure to object or except to the Regional Director's Supplemental Decision and Order of December 2, 1966, constituted a waiver of the defect – if one existed. Furthermore, the contention is untimely raised. *R. A. Holman & Co., Inc., v. Securities and Exchange Commission,* 336 F. 2d 446, 454-5 (C.A. 2, 1966). It may be added that since the Board's rules provide for such hearings it would not be within the province of the Board's Trial Examiner to hold them illegal.

In any event the Respondent has not shown it has been prejudiced by the holding of the hearings on the challenges. The record is complete for review of the merits of the challenges. The Respondent offers no evidence which has been excluded. Indeed, the Respondent's consistent position throughout the representation proceeding, as we have seen, is that the issue of supervisory status had been litigated in the original hearing and it was therefore improper to investigate its post-election. With respect to the contention that the rules of evidence differ in representation and unfair labor practice hearings, no showing is made that this difference has had, or any suggestion made as to how it might have had, any substantial effect on the outcome of the proceeding.

Finally, I deem unsubstantiated on the merits the Respondent's contention that a post-election hearing in representation cases is unlawful. That Section 9(c) of the Act *requires* a hearing upon the filing of a petition if the Board has reasonable cause to believe that a question concerning representation affecting commerce is raised, is not authority for the proposi-

tion that the section forbids any other hearing in connection with issues raised in the case. I am cited to no authority forbidding an administrative agency of the United States Government to hold a hearing prior to disposition of issues within its competence if it deems such action necessary or desirable for the development of a full record or for the protection of substantive rights. As to the prohibition in Section 9(c) (1) against recommendations by a hearing officer, that is directed to the mandatory pre-election hearing and has no application to post-election or discretionary hearings.

It is consequently found that there are no unresolved issues requiring hearing before a trial examiner. The refusal to bargain being established, judgment on the pleadings is appropriate and the motion therefore is hereby granted.

However the General Counsel's motion to strike various portions of the Respondent's answer as sham or frivolous is denied. In substantial measure these denials are necessary if the Respondent is to preserve its right to pursue review of the representation decision. For without traverse of the allegations bearing on the Union's representative status the Respondent would have no issue to press before the Board or a court. *N.L.R.B. v. Rexall Chemical Co.*, 370 F. 2d 363 (1 CA 1967). That the matters may have been decided by the Board adversely to the Respondent in decisions which are binding on the trial examiner does not make the Respondent's contest of their correctness sham or frivolous pleading.

I hereby make the following further:

Findings

I. The Business of the Respondent

Respondent is a Texas corporation with its office and place of business at Dallas, Texas, where it is engaged in the

manufacture, sale and distribution of printed materials and related products. During the past year, Respondent, in the course and conduct of its business operations, sold and distributed at its plant products valued in excess of $100,000 of which products values in excess of $50,000 were shipped from said plant directly to points outside the state of Texas. Respondent is engaged in commerce within the meaning of the Act.

II. The Labor Organization Involved

The Union is now and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

The following employees constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

All lithographic production employees employed at the Respondent's Dallas, Texas, plant, excluding all other employees, inspectors, office clerical employees, guards, watchmen and supervisors as defined in the Act.

On September 27, 1966, a majority of Respondent's employees in the appropriate unit selected the Union as their collective bargaining representative in a secret-ballot election conducted under the supervision of the Regional Director for Region 16 of the National Labor Relations Board.

At all times since April 5, 1967, and continuing to date, the Union has been the representative for the purposes of collective bargaining of the employees in the said unit, and by virtue of

Section 9(a) of the Act has been, and is now, the exclusive representative of all the employees in said unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

Since on or about April 5, 1967, and continuing to date, the Union requested and continue to request, Respondent to bargain collectively with respect to rates of pay, wages, hours of employment and other terms and conditions of employment.

On or about June 3, 1967, and at all times thereafter Respondent did refuse, and continues to refuse, to bargain collectively with the Union.

By such action the Respondent has refused to bargain collectively in violation of Section 8(a) (5) of the Act and has interfered with, restrained and coerced its employees in violation of Section 8(a) (1) of the Act.

The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings and the entire record in the case, and pursuant to Section 10(c) of the Act, I recommend that the Board issue the following:

ORDER

A. For purposes of determining the effective period of duration of the certification the initial year of certification shall be deemed to begin on the date the Respondent commences to

bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit.[6]

B. Riverside Press, Inc., Dallas, Texas, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Local 267, Lithographers and Photoengravers International Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All lithographic production employees employed at the Respondent's Dallas, Texas, plant, excluding all other employees, guards, watchmen and supervisors as defined in the Act.

(b) Interfering with the efforts of said Union to negotiate for or represent the employees in said appropriate unit as the exclusive bargaining representative.

2. Take the following affirmative action which is necessary to effectuate the polices of the Act.

(a) Upon request, bargain collectively with Local 267, Lithographers and Photoengravers International Union, as the exclusive representative of the employees in the appropriate unit with respect to rates of

6. The purpose of this provision is to ensure that the employees in the appropriate unit will be accorded the statutorily prescribed services of their selected bargaining agent for the period provided by law. See *Mar-Jac Poultry Co., Inc.*, 136 NLRB 785; *Commerce Co. d/b/a Lamar Hotel*, 140 NLRB 226, 229, 328 F. 2d 600 (C.A. 5, 1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421, 350 F. 2d 57 (C.A. 10, 1965).

pay, wages, hours of work, and other terms and conditions of employment, and embody in a signed written agreement any understanding reached.

(b) Post at its Dallas, Texas, plant, copies of the notice attached hereto marked "Appendix."[7] Copies of said notice on forms to be furnished by the Regional Director of Region 16, after being duly signed by an authorized representative of the Respondent, shall be posted by the Respondent immediately upon receipt thereof and maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 16, in writing, within 20 days from receipt of this recommended Order what steps it has taken to comply herewith.[8]

Dated at Washington, D. C. Nov. 21, 1967

/s/ CHARLES W. SCHNEIDER

Charles W. Schneider
Trial Examiner

7. In the event that this recommended Order is adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words, "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words, "A DECREEE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

8. In the event that this recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director of Region 16 in writing, within 10 days from the date of this order what steps the Respondent has taken to comply herewith."

Appendix

NOTICE TO ALL EMPLOYEES

Pursuant To

The Recommended Order of a Trial Examiner of the
National Labor Relations Board
and in order to effectuate the policies of the
National Labor Relations Act
(As Amended)

we hereby notify our employees that:

WE WILL NOT refuse to bargain collectively with LOCAL 267 LITHOGRAPHERS AND PHOTOENGRAVERS INTERNATIONAL UNION, AFL-CIO as the exclusive collective bargaining representative of all the following employees:

> All lithographic production employees employed at our Dallas, Texas, plant, exluding all other employees, inspectors, office clerical employees, guards, watchmen and supervisors as defined in the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of their rights under the Act.

WE WILL bargain collectively with LOCAL 267 LITHOGRAPHERS AND PHOTOENGRAVERS INTERNATIONAL UNION, AFL-CIO as exclusive bargaining representative of the employees in the bargaining unit, and if an understanding is reached we will sign a contract with that Union.

THE RIVERSIDE PRESS, INC. (Employer)

Dated ..... By .....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 8A24 Federal Office Building, 819 Taylor Street, Fort Worth, Texas 76102 (Tel. No. 334-2934).

United States of America
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 16-CA-3052

THE RIVERSIDE PRESS, INC.,

and

LOCAL 267, LITHOGRAPHERS AND PHOTOENGRAVERS INTERNATIONAL UNION, AFL-CIO

DECISION AND ORDER

On November 21, 1967, Trial Examiner Charles W. Schneider issued his Decision in the above proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth

in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.

Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has considered the Trial Examiner's Decision, the exceptions and supporting brief, and the entire record in this case, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations.

ORDER

Pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, as modified below, and hereby orders that the Respondent, The Riverside Press, Inc., Dallas, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as herein modified:

1. Delete from paragraph 2 (b) of the Trial Examiner's Recommended Order that part thereof which reads "to be furnished" and substitute therefor "on forms provided . . . "

Dated, Washington, D. C. Feb. 8, 1968

. . . . . .
Gerald A. Brown, Member

. . . . . .
Howard Jenkins, Jr., Member

. . . . . .
Sam Zagoria, Member

NATIONAL LABOR
[SEAL] RELATIONS BOARD

APPENDIX C

UNIVERSAL CAMERA CORP. v. NATIONAL LABOR RELATIONS BOARD.

No. 40.

Argued Nov. 6, 7, 1950.

Decided Feb. 26, 1951.

Mr. Justice FRANKFURTER delivered the opinion of the Court.

The essential issue raised by this case and its companion, National Labor Relations Board v. Pittsburgh Steamship Co., 340 U.S. 498, 71 S.Ct. 453, infra, is the effect of the Administrative Procedure Act and the legislation colloquially known as the Taft-Hartley Act, 5 U.S.C.A. § 1001 et seq.; 29 U.S.C.A. § 141 et seq., on the duty of Courts of Appeals when called upon to review orders of the National Labor Relations Board.

The Court of Appeals for the Second Circuit granted enforcement of an order directing, in the main, that petitioner reinstate with back pay an employee found to have been discharged because he gave testimony under the Wagner Act, 29 U.S.C.A. § 151 et seq., and cease and desist from discriminating against any employee who files charges or gives testimony under that Act. The court below, Judge Swan dissenting, decreed full enforcement of the order. 2 Cir., 179 F. 2d 749. Because the views of that court regarding the effect of the new legislation on the relation between the Board and the courts of appeals in the enforcement of the Board's orders conflicted with those of the

Court of Appeals for the Sixth Circuit[1] we brought both cases here. 339 U.S. 951, 70 S.Ct. 842 and 339 U.S. 962, 70 S.Ct. 998. The clash of opinion obviously required settlement by this Court.

I.

Want of certainty in judicial review of Labor Board decisions partly reflects the intractability of any formula to furnish definiteness of content for all the impalpable factors involved in judicial review. But in part doubts as to the nature of the reviewing power and uncertainties in its application derive from history, and to that extent an eludication of this history may clear them away.

The Wagner Act provided: "The findings of the Board as to the facts, if supported by evidence, shall be conclusive." Act of July 5, 1935, § 10(e), 49 Stat. 449, 454, 29 U.S.C. § 160(e), 29 U.S.C.A. § 160(e). This court read "evidence" to mean "substantial evidence," Washington, V. & M. Coach Co. v. Labor Board, 301 U.S. 142, 57 S.Ct. 648, 81 L.Ed. 965, and we said that "[s]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.". Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197, 229, 59 S.Ct. 206, 217, 83 L.Ed. 126. Accordingly, it "must do

1. National Labor Relations Board v. Pittsburgh Steamship Co., 180 F. 2d 731; Id., 340 U. S. 498, 71 S. Ct. p. 453, infra. The Courts of Appeals of five circuits have agreed with the Court of Appeals for the Second Circuit that no material change was made in the reviewing power. Eastern Coal Corp. v. National Labor Relations Board, 4 Cir., 176 F. 2d 131, 134-136; National Labor Relations Board v. La Salle Steele Co., 7 Cir., 178 F. 2d 829, 833-834; National Labor Relations Board v. Minnesota Mining & Mfg. Co., 8 Cir., 179 F. 2d 323, 325-326; National Labor Relations Board v. Continental Oil Co., 10 Cir., 179 F. 2d 552, 555; National Labor Relations Board v. Booker, 5 Cir., 180 F. 2d 727, 729; but *see* Labor Board v. Caroline Mills, Inc., 5 Cir., 167 F. 2d 212, 213.

more than create a suspicion of the existence of the fact to be established. * * it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." National Labor Relations Board v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300, 59 S.Ct. 501, 505, 83 L.Ed. 660.

The very smoothness of the "substantial evidence" formula as the standard for reviewing the evidentiary validity of the Board's findings established its currency. But the inevitably variant applications of the standard to conflicting evidence soon brought contrariety of views and in due course bred criticism. Even though the whole record may have been canvassed in order to determine whether the evidentiary foundation of a determination by the Board was "substantial," the phrasing of this Court's process of review readily lent itself to the notion that it was enough that the evidence supporting the Board's result was "substantial" when considered by itself. It is fair to say that by imperceptible steps regard for the fact-finding function of the Board led to the assumption that the requirements of the Wagner Act were met when the reviewing court could find in the record evidence which, when viewed in isolation, substantiated the Board's findings. Compare National Labor Relations Board v. Waterman Steamship Corp., 309 U.S. 206, 60 S.Ct. 493, 84 L.Ed. 704; National Labor Relations Board v. Bradford Dyeing Ass'n, 310 U.S. 318, 60 S.Ct. 918, 84 L.Ed. 1225; and see National Labor Relations Board v. Nevada Consolidated Copper Corp., 316 U.S. 105, 62 S.Ct. 960, 86 L.Ed. 1305. This is not to say that every member of this Court was consciously guided by this view or that the Court ever explicitly avowed this practice as doctrine. What matters is that

the belief justifiably arose that the court had so construed the obligation to review.[2]

Criticism of so contracted a reviewing power reinforced dissatisfaction felt in various quarters with the Board's administration of the Wagner Act in the years preceding the war. The scheme of the Act was attacked as an inherently unfair fusion of the functions of prosecutor and judge.[3] Accusations of partisan bias were not wanting.[4] The "irresponsible admission and weighing of hearsay, opinion, and emotional speculation in place of factual evidence" was said to be a "serious menace."[5] No doubt some, perhaps even much, of the criticism was baseless and some surely was reckless.[6] What is here relevant, however, is the climate of opinion thereby generated and its effect on Congress. Protests against "shocking injustices"[7] and intimations of judicial "abdication"[8] with which some courts

2. See the testimony of Dean Stason before the Subcommittee of the Senate Committee on the Judiciary in 1941. Hearings on S. 674, 77th Cong., 1st Sess. 1355–1360.

3. See, for example, the remarks of Laird Bell, then Chairman of the Committee on Administrative Law of the Chicago Bar Association, writing in 1940 in the American Bar Association Journal. 26 A.B.A.J. 552.

4. See Gall, The Current Labor Problem: The View of Industry, 27 Iowa L. Rev. 381, 382.

5. This charge was made by the majority of the Special Committee of the House appointed in 1939 to investigate the National Labor Relations Board. H. R. Rep. No. 1902, 76th Cong., 3d Sess. 76.

6. Professor Gellhorn and Mr. Linfield reached the conclusion in 1939 after an extended investigation that "the denunciations find no support in fact." Gellhorn and Linfield, Politics and Labor Relations, 39 Col. L. Rev. 339, 394. See also Millis and Brown, From the Wagner Act to Taft-Hartley, 66-75.

7. Wilson & Co. *v.* National Labor Relations Board, 7 Cir., 126 F. 2d 114, 117.

8. In National Labor Relations Board v. Standard Oil Co., 2 Cir., 138 F. 2d 885, 887, Judge Learned Hand said, "We understand the law to be that the decision of the Board upon that issue is for all practical purposes not open to us at all; certainly not after we have once decided that there was 'substantial' evidence that the 'disestablished' union was immediately preceded by a period during which there was a 'dominated' union.
* * *
"[W]e recognize how momentous may be such an abdication of any power of review * * *."

granted enforcement of the Board's orders stimulated pressures for legislative relief from alleged administrative excesses.

The strength of these pressures was reflected in the passage in 1940 of the Walter-Logan Bill. It was vetoed by President Roosevelt, partly because it imposed unduly rigid limitations on the administrative process, and partly because of the investigation into the actual operation of the administrative process then being conducted by an experienced committee appointed by the Attorney General.[9] It is worth noting that despite its aim to tighten control over administrative determinations of fact, the Walter-Logan Bill contented itself with the conventional formula that an agency's decision could be set aside if "the findings of fact are not supported by substantial evidence".[10]

The final report of the Attorney General's Committee was submitted in January, 1941. The majority concluded that "[d]issatisfaction with the existing standards as to the scope of judicial review derives largely from dissatisfaction with the fact-finding procedures now employed by the administrative bodies."[11] Departure from the "substantial evidence" test, it thought, would either create unnecessary uncertainty or transfer to courts the responsibility for ascertaining and assaying matters the significance of which lies outside judicial competence. Accordingly, it recommended against legislation embodying a general scheme of judicial review.[12]

9. 86 Cong. Rec. 13942-13943, reprinted as H. R. Doc. No. 986, 76th Cong., 3d Sess.

10. S. 915, H.R. 6324, 76th Cong., 1st Sess., § 5(a).

11. Final Report, 92.

12. Referring to proposals to enlarge the scope of review to permit inquiry whether the findings are supported by the weight of the evidence, the majority said:

"Assuming that such a change may be desirable with respect to special administrative determinations, there is serious objection to its adoption for general application.

(cont'd. on next page)

Three members of the committee registered a dissent. Their view was that the "present system or lack of system of judicial review" led to inconsistency and uncertainty. They reported that under a "prevalent" interpretation of the "substantial evidence" rule "if what is called 'substantial evidence' is found anywhere in the record to support conclusions of fact, the courts are said to be obliged to sustain the decision without reference to how heavily the contervailing evidence may preponderate—unless indeed the stage of arbitrary decision is reached. Under this interpretation, the courts need to read only one side of the case and, if they find any evidence there, the administrative action is to be sustained and the record to the contrary is to be ignored."[13] Their view led them to recommend that Congress enact principles of review applicable to all agencies not excepted by unique characteristics. One of these principles was expressed by the formula that judicial review could extend to "findings, inferences, or conclusions of fact

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"In the first place there is the question of how much change, if any, the amendment would produce. The respect that courts have for the judgments of specialized tribunals which have carefully considered the problems and the evidence cannot be legislated away. The line between 'substantial evidence' and 'weight of evidence' is not easily drawn – particularly when the court is confined to a written record, has a limited amount of time, and has no opportunity further to question witnesses on testimony which seems hazy or leaves some lingering doubts unanswered. 'Substantial evidence' may well be equivalent to the 'weight of evidence' when a tribunal in which one has confidence and which had greater opportunities for accurate determination has already so decided.

"In the second place the wisdom of a general change to review of the 'weight of evidence' is questionable. If the change would require the courts to determine independently which way the evidence preponderates, administrative tribunals would be turned into little more than media for transmission of the evidence to the courts. It would destroy the values of adjudication of fact by experts or specialists in the field involved. It would divide the responsibility for adminstrative adjudications." Final Report, 91-92.

13. Id., 210-211.

unsupported, upon the whole record, by substantial evidence."[14] So far as the history of this movement for enlarged review reveals, the phrase "upon the whole record" makes its first appearance in this recommendation of the minority of the Attorney General's Committee. This evidence of the close relationship between the phrase and the criticism out of which it arose is important, for the substance of this formula for judicial review found its way into the statute books when Congress with unquestioning—we might even say uncritical—unanimity enacted the Administrative Procedure Act.[15]

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14. The minority enumerated four "existing deficiencies" in judicial review. These were (1) "the haphazard, uncertain, and variable results of the present system or lack of system of judicial review," (2) the interpretation permitting substantiality to be determined without taking into account conflicting evidence, (3) the failure of existing formulas "to take account of differences between the various types of fact determinations," and (4) the practice of determining standards of review by "case-to-case procedure of the courts." They recommended that

"Until Congress finds it practicable to examine into the situation of particular agencies, it should provide more definitely by general legislation for both the availability and scope of judicial review in order to reduce uncertainty and variability. As the Committee recognizes in its report, there are several principal subjects of judicial review – including constitutional questions, statutory interpretation, procedure, and the support of findings of fact by adequate evidence. The last of these should, obviously we think, mean support of all findings of fact, including inferences and conclusion of fact, upon the *whole* record. Such a legislative provision should, however, be qualified by a direction to the courts to respect the experience, technical competence, specialized knowledge, and discretionary authority of each agency. We have framed such a provision in the appendix to this statement." Id., 210-212.

The text of the recommended provision is as follows:

"*(c) Scope of review.* – As to the findings, conclusions, and decisions in any case, the reviewing court, regardless of the form of the review proceeding, shall consider and decide so far as necessary to its decision and where raised by the parties, all relevant questions of: (1) constitutional right, power, privilege, or immunity; (2) the statutory authority or jurisdiction of the agency; (3) the lawfulness and adequacy of procedure; (4) findings, inferences, or conclusions of fact unsupported, upon the whole record, by substantial evidence; and (5) administrative action otherwise arbitrary or capricious. *Provided, however,* That upon such review due weight shall be accorded the experience, technical competence, specialized knowledge, and legislative policy of the agency involved as well as the discretionary authority conferred upon it." Id., 246-247.

15. 60 Stat. 237, 5 U. S. C. § 1001 et seq., 5 U. S. C. A. § 1001 et seq. The form finally adopted reads as follows:

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One is tempted to say "uncritical" because the legislative history of that Act hardly speaks with that clarity of purpose which Congress supposedly furnishes courts in order to enable them to enforce its true will. On the one hand, the sponsors of the legislation indicated that they were reaffirming the prevailing "substantial evidence" test.[16] But with equal clarity they expressed disapproval of the manner in which the courts were applying their own standard. The committee reports of both houses refer to the practice of agencies to rely upon "suspicion, surmise, implications, or plainly incredible evidence," and

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"Sec. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion. * * *

"(c) Scope of Review. – So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the *whole* record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error." 60 Stat. 243-244, 5 U. S. C. § 1009 (e), 5 U. S. C. A. § 1009 (e). (Italics ours.)

In the form in which the bill was originally presented to Congress, clause (B)(5) read, "unsupported by competent, material, and substantial evidence upon the whole agency record as reviewed by the court in any case subject to the requirements of sections 7 and 8." H. R. 1203, 79th Cong., 1st Sess., quoted in S. Doc. No. 248, 79th Cong., 2d Sess. 155, 160. References to competency and materiality of evidence were deleted and the final sentence added by the Senate Committee. S. Rep. No. 752, 79th Cong., 1st Sess. 28; S. Doc. No. 248, supra, 39-40, 214. No reason was given for the deletion.

16. A statement of the Attorney General appended to the Senate Report explained that the bill "is intended to embody the law as declared, for example, in Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197, 59 S. Ct. 206, 83 L.Ed. 126." Section 10(e) of Appendix B to S. Rep. No. 752, supra, reprinted in S. Doc. No. 248, supra, 230. Mr. McFarland, then Chairman of the American Bar Association Committee on Adminstrative Law, testified before the House Judiciary Committee to the same effect. Id., 85-86.

indicate that courts are to exact higher standards "in the exercise of their independent judgment" and on consideration of "the whole record."[17]

Similar dissatisfaction with too restricted application of the "substantial evidence" test is reflected in the legislative history of the Taft-Hartley Act.[18] The bill as reported to the house provided that the "findings of the Board as to the facts shall be conclusive unless it is made to appear to the satisfaction of the court either (1) that the findings of fact are against the manifest weight of the evidence, or (2) that the findings of fact are not supported by substantial evidence"[19] The bill left the House with this provision. Early committee prints in the Senate provided for review by "weight of the evidence" or "clearly erroneous" standards.[20] But, as the Senate Committee Report

17. The following quotation from the report of the Senate Judiciary Committee indicates the position of the sponsors. "The 'substantial evidence' rule set forth in section 10(e) is exceedingly important. As a matter of language, substantial evidence would seem to be an adequate expression of law. The difficulty comes about in the practice of agencies to rely upon (and of courts to tacitly approve) something less – to rely upon suspicion, surmise: implications, or plainly incredible evidence. It will be the duty of the courts to determine in the final analysis and in the exercise of their independent judgment, whether on the whole record the evidence in a given instance is sufficiently substantial to support a finding, conclusion, or other agency action as a matter of law. In the first instance, however, it will be the function of the agency to determine the sufficiency of the evidence upon which it acts – and the proper performance of its public duties will require it to undertake this inquiry in a careful and dispassionate manner. Should these objectives of the bill as worded fail, supplemental legislation will be required." S. Rep. No. 752, supra, 30-31. The House Committee Report is to substantially the same effect. H. R. Rep. No. 1980, 79th Cong., 2d Sess. 45. The reports are reprinted in S. Doc. No. 248, supra, 216-217, 279.

See also the response of Senator McCarran in debate, to the effect that the bill changed the "rule" that courts were "powerless to interfere" when there "was no probative evidence." Id., 322. And see the comment of Congressman Springer, a member of the House Judiciary Committee, id., 376.

18. 61 Stat. 136, 29 U.S.C. (Supp. III) § 141 et seq., 29 U.S.C.A. § 141 et seq.

19. H. R. 3020, 80th Cong., 1st Sess., § 10(e), reprinted in 1 Legislative History of the Labor Mangement Relations Act 1947, p. 71.

20. The history of the evolution of the Senate provision was given by Senator Morse. 93 Cong. Rec. 5108, reprinted in 2 Legislative History 1504-1505. The prints were not approved by the Committee.

relates, "it was finally decided to conform the statute to the corresponding section of the Administrative Procedure Act where the substantial evidence test prevails. In order to clarify any ambiguity in that statute, however, the committee inserted the words 'questions of fact, if supported by substantial evidence *on the record considered as a whole* * * *.'"[21]

This phraseology was adopted by the Senate. The House conferees agreed. They reported to the House: "It is believed that the provisions of the conference agreement relating to the courts' reviewing power will be adequate to preclude such decisions as those in N.L.R.B. v. Nevada Consol. Copper Corp., 316 U.S. 105, 62 S. Ct. 960, 86 L.Ed. 1305 and in the Wilson, Columbia Products, Union Pacific Stages, Hearst, Republic Aviation, and Le Tourneau, etc. cases, supra, without unduly burdening the courts."[22] The Senate version became the law.

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21. S. Rep. No. 105, 80th Cong., 1st Sess. 26-27, reprinted in 1 Legislative History 432-433. The Committee did not explain what the ambiguity might be; and it is to be noted that the phrase it italicized is indistinguishable in content from the requirement of § 10(e) of the Adminstrative Procedure Act that "the court shall review the whole record or such portions thereof as may be cited by any party * * *."

Senator Taft gave this explanation to the Senate of the meaning of the section: "In the first place, the evidence must be substantial; in the second place, it must still look substantial when viewed in the light of the entire record. That does not go so far as saying that a decision can be reversed on the weight of the evidence. It does not go quite so far as the power given to a circuit court of appeals to review a district-court decision, but it goes a great deal further than the present law, and gives the court greater opportunity to reverse an obviously unjust decision on the part of the National Labor Relations Board." 93 Cong. Rec. 3839, reprinted in 2 Legislative History 1014.

22. H.R. Rep. No. 510, 80th Cong., 1st Sess. 56, reprinted in 1 Legislative History 560. In National Labor Relations Board v. Nevada Consolidated Copper Corp., 316 U.S. 105, 107, 62 S.Ct. 960, 961, 86 L.Ed. 1305, we reversed a judgment refusing to enforce a Board order because "upon an examination of the record we cannot say that the findings of fact of the Board are without support in the evidence". The sufficiency of evidence to support findings of fact is not involved in the three other decisions of this Court to which reference was made. National Labor Relations Board v. Hearst Publications, Inc., 322 U.S. 111, 64 S.Ct. 851, 88 L.Ed.

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It is fair to say that in all this Congress expressed a mood. And it expressed its mood not merely by oratory but by legislation. As legislation that mood must be respected, even though it can only serve as a standard for judgment and not as a body of rigid rules assuring sameness of application. Enforcement of such broad standards implies subtlety of mind and solidity of judgment. But it is not for us to question that Congress may assume such qualities in the federal judiciary.

From the legislative story we have summarized, two concrete conclusions do emerge. One is the identity of aim of the Administrative Procedure Act and the Taft-Hartley Act regarding the proof with which the Labor Board must support a decision. The other is that now Congress has left no roof for doubt as to the kind of scrutiny which a court of appeals must give the record before the Board to satisfy itself that the Board's order rests on adequate proof.

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1170; Republic Aviation Corp. v. National Labor Relations Board (Labor Board v. Le Tourneau Co.), 324 U.S. 793, 65 S.Ct. 982, 89 L.Ed. 557. The language used by the court offers a probable explanation for including two of the decisions of Courts of Appeals. In Wilson & Co. v. National Labor Relations Board, 126 F. 2d 114, 117, the Court of Appeals for the Seventh Circuit sustained a finding that the employer dominated a company union after stating that it had "recognized (or tried to) that findings must be sustained, even when they are contrary to the great weight of the evidence, and we have ignored, or at least endeavored to ignore, the shocking injustices which such findings, opposed to the overwhelming weight of the evidence, produce." National Labor Relations Board v. Columbia Products Corp., 141 F. 2d 687, 688 is a *per curiam* decision of the Court of Appeals for the Second Circuit sustaining a finding of discriminatory discharge. The court said of the Board's decision on a question of fact, "Though it may strain our credulity, if it does not quite break it down, we must accept it * * *." The reason for disapproval of National Labor Relations Board v. Union Pacific Stages, 99 F. 2d 153, is not apparent. The Court of Appeals for the Ninth Circuit there enforced the portion of the Board's order directing the company to disavow a policy of discrimination against union members, on the ground that there appeared "to be evidence, although disputed," that some company officials had discouraged employees from joining. 99 F. 2d at 179. The bulk of the lengthy opinion, however, is devoted to a discussion of the facts to support the court's conclusion that the Board's findings of discriminatory discharges should not be sustained.

[1] It would be mischievous wordplaying to find that the scope of review under the Taft-Hartley Act is any different from that under the Administrative Procedure Act. The Senate Committee which reported the review clause of the Taft-Hartley Act expressly indicated that the two standards were to conform in this regard, and the wording of the two Acts is for purposes of judicial administration identical. And so we hold that the standard of proof specifically required of the Labor Board by the Taft-Hartley Act is the same as that to be exacted by courts reviewing every administrative action subject to the Administrative Procedure Act.

[2] Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitively precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes that courts consider the whole record. Committee reports and the adoption in the Administrative Procedure Act of the minority views of the Attorney General's Committee demonstrate that to enjoin such a duty on the reviewing court was one of the important purposes of the movement which eventuated in that enactment.

[3] To be sure, the requirement for canvassing "the whole record" in order to ascertain substantiality does not furnish a calculus of value by which a reviewing court can assess the

evidence. Nor was it intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. Nor does it mean that even as to matters not requiring experitse a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*. Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.

There remains, then, the question whether enactment of these two statutes has altered the scope of review other than to require that substantiality be determined in the light of all that the record relevantly presents. A formula for judicial review of administrative action may afford grounds for certitude but cannot assure certainty of application. Some scope for judicial discretion in applying the formula can be avoided only by falsifying the actual process of judging or by using the formula as an instrument of futile casuistry. It cannot be too often repeated that judges are not automata. The ultimate reliance for the fair operation of any standard is a judiciary of high competence and character and the constant play of an informed professional critique upon its work.

Since the precise way in which courts interfere with agency findings cannot be imprisoned within any form of words, new

formulas attempting to rephrase the old are not likely to be more helpful than the old. There are no talismanic words that can avoid the process of judgment. The difficulty is that we cannot escape, in relation to this problem, the use of undefined defining terms.

Whatever changes were made by the Administrative Procedure and Taft-Hartley Acts are clearly within this area where precise definition is impossible. Retention of the familiar "substantial evidence" terminology indicates that no drastic reversal of attitude was intended.

[4] But a standard leaving an unavoidable margin for individual judgment does not leave the judicial judgment at large even though the phrasing of the standard does not wholly fence it in. The legislative history of these Acts demonstrates a purpose to impose on courts a responsibility which has not always been recognized. Of course it is a statute and not a committee report which we are interpreting. But the fair interpretation of a statute is often "the art of proliferating a purpose", Brooklyn National Corp. v. Commissioner, 2 Cir., 157 F. 2d 450, 451, revealed more by the demonstrable forces that produced it than by its precise phrasing. The adoption in these statutes of the judicially-constructed "substantial evidence" test was a response to pressures for stricter and more uniform practice, not a reflection of approval of all existing practices. To find the change so elusive that it cannot be precisely defined does not mean it may be ignored. We should fail in our duty to effectuate the will of Congress if we denied recognition to expressed Congressional disapproval of the finality accorded to Labor Board findings by some decisions of

this and lower courts, or even of the atmosphere which may have favored those decisions.

[5] We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both.

From this it follows that enactment of these statutes does not require every Court of Appeals to alter its practice. Some—perhaps a majority—have always applied the attitude reflected in this legislation. To expore whether a particular court should or should not alter its practice would only divert attention from the application of the standard now prescribed to a futile inquiry into the nature of the test formerly used by a particular court.

[6] Our power to review the correctness of application of the present standard ought seldom to be called into action.

Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied.

II.

Our disagreement with the view of the court below that the scope of review of Labor Board decisions is unaltered by recent legislation does not of itself, as we have noted, require reversal of its decision. The court may have applied a standard of review which satisfies the present Congressional requirement.

The decision of the Court of Appeals is assailed on two grounds. It is said (1) that the court erred in holding that it was barred from taking into account the report of the examiner on questions of fact insofar as that report was rejected by the Board, and (2) that the Board's order was not supported by substantial evidence on the record considered as a whole, even apart from the validity of the court's refusal to consider the rejected portions of the examiner's report.

[7] The latter contention is easily met. It is true that two of the earlier decisions of the court below were among those disapproved by Congress.[23] But this disapproval, we have seen, may well have been caused by unintended intimations of judicial phrasing. And in any event, it is clear from the court's opinion in this case that it in fact did consider the "record as a

23. National Labor Relations Board v. Standard Oil Co., 2 Cir., 138 F. 2d 885; National Labor Relations Board v. Columbia Products Corp., 2 Cir., 141 F. 2d 687. See notes 8 and 22, supra.

whole,"[*] and did not deem itself merely the judicial echo of the Board's conclusion. The testimony of the company's witnesses was inconsistent, and there was clear evidence that the complaining employee had been discharged by an officer who was at one time influenced against him because of his appearance at the Board hearing. On such a record we could not say that it would be error to grant enforcement.

III.

[8] The Court of Appeals deemed itself bound by the Board's rejection of the examiner's findings because the court considered these findings not "as unassailable as a master's." [24] 179 F. 2d at 752. They are not. Section 10 (c) of the Labor Management Relations Act provides that "If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact * * *." 61 Stat. 147, 29 U. S. C. (Supp. III) § 160 (c), 29 U.S.C.A. § 160 (c). The responsibility for decision thus placed on the Board is wholly inconsistent with the notion that it has power to reverse an examiner's findings only when they are "clearly erroneous." Such a limitation would make so drastic a departure from prior administrative practice that explicitness would be required.

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24. Rule 53(e) (2), Fed. Rules Civ. Proc., 28 U. S. C. A., gives finality to the findings of a master unless they are clearly erroneous.

The court's ruling excluding from consideration disagreement between the Board and the examiner was in apparent conflict with the view of three other circuits. National Labor Relations Board v. Ohio Calcium Co., 6 Cir., 133 F. 2d 721, 724; A. E. Staley Mfg. Co. v. National Labor Relations Board, 7 Cir., 117 F. 2d 868, 878; Wilson & Co. v. National Labor Relations Board, 8 Cir., 123 F. 2d 411, 418; cf. International Ass'n of Machinists v. National Labor Relations Board, 71 App.D.C. 175, 180, 110 F. 2d 29, 34.

The Court of Appeals concluded from this premise "that, although the Board would be wrong in totally disregarding his findings, it is practically impossible for a court, upon review of those findings which the Board itself substitutes, to consider the Board's reversal as a factor in the court's own decision. This we say, because we cannot find any middle ground between doing that and treating such a reversal as error, whenever it would be such, if done by a judge to a master in equity." 179 F. 2d at 753. Much as we respect the logical acumen of the Chief Judge of the Court of Appeals, we do not find ourselves pinioned between the horns of his dilemma.

We are aware that to give the examiner's findings less finality than a master's and yet entitle them to consideration in striking the account, is to introduce another and an unruly factor into the judgmatical process of review. But we ought not to fashion an exclusionary rule merely to reduce the number of imponderables to be considered by reviewing courts.

The Taft-Hartley Act provides that "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." 61 Stat. 148, 29 U. S. C. (Supp. III) § 160 (e), 29 U. S. C. A. § 160 (e). Surely an examiner's report is as much a part of the record as the complaint or the testimony. According to the Administrative Procedure Act, "All decisions (including initial, recommended, or tentative decisions) shall become a part of the record * * *." § 8 (b), 60 Stat. 242, 5 U. S. C. § 1007 (b), 5 U. S. C. A. § 1007 (b). We found that this Act's provision for judicial review has the same meaning as that in the Taft-Hartley Act. The similarity of the two statutes in language and purpose also requires that the definition of

"record" found in the Administrative Procedure Act be construed to be applicable as well to the term "record" as used in the Taft-Hartley Act.

It is therefore difficult to escape the conclusion that the plain language of the statutes directs a reviewing court to determine the substantiality of evidence on the record including the examiner's report. The conclusion is confirmed by the indications in the legislative history that enhancement of the status and function of the trial examiner was one of the important purposes of the movement for administrative reform.

This aim was set forth by the Attorney General's Committee on Administrative Procedure: "In general, the relationship upon appeal between the hearing commissioner and the agency ought to a considerable extent to be that of trial court to appellate court. Conclusions, interpretations, law, and policy should, of course, be open to full review. On the other hand, on matters which the hearing commissioner, having heard the evidence and seen the witnesses, is best qualified to decide, the agency should be reluctant to disturb his findings unless error is clearly shown."[25]

Apparently it was the Committee's opinion that these recommendations should not be obligatory. For the bill which accompanied the Final Report required only that hearing officers make an initial decision which would become final in the absence of further agency action, and that agencies which differed on the facts from their examiners give reasons and

25. Final Report, 51.

26. ss 308(1) and 309(2) of the proposed bill, quoted in Final Report, 200, 201.

record citations supporting their conclusion.[26] This proposal was further moderated by the Administrative Procedure Act. It permits agencies to use examiners to record testimony but not to evaluate it, and contains the rather obscure provision that an agency which reviews an examiner's report has "all the powers which it would have in making the initial decision."[27]

But this refusal to make mandatory the recommendations of the Attorney General's Committee should not be construed as a repudiation of them. Nothing in the statutes suggests that the Labor Board should not be influenced by the examiner's opportunity to observe the witnesses he hears and sees and the Board does not. Nothing suggests that reviewing courts should not give to the examiner's report such probative force as it intrinsically commands. To the contrary, § 11 of the Administrative Procedure Act contains detailed provisions designed to maintain high standards of independence and competence in examiners. Section 10 (c) of the Labor Management Relations Act requires that examiners "shall issue * * * a proposed report, together with a recommended order". Both statutes thus evince a purpose to increase the importance of the role of examiners in the administrative process. High standards of public administra-

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27 ... 8(a), 60 Stat. 242, 5 U. S. C. § 1007(a). The quoted provision did not appear in the bill in the form in which it was introduced into the Senate. S. 7, 79th Cong., 1st Sess., § 7. It was added by the Senate Judiciary Committee. The Committee published its reasons for modifying the earlier draft, but gave no explanation for this particular change. See S. Doc. No. 248, supra, 32-33. It is likely that the sentence was intended to embody a clause in the draft prepared by the Attorney General's Committee, which provided that on review of a case decided initially by an examiner an agency should have jurisdiction to remand or to "affirm, reverse, modify, or set aside in whole or in part the decision of the hearing commissioner, or itself to make any finding which in its judgment is proper upon the record." § 309(2), Final Report, 201. The substance of this recommendation was included in bills introduced into the House. H.R. 184, 79th Cong., 1st Sess., § 309(2), and H.R. 339, 79th Cong., 1st Sess., § 7(c), both quoted in S. Doc. No. 248, supra, 138, 143.

tion counsel that we attribute to the Labor Board's examiners both due regard for the responsibility which Congress imposes on them and the competence to discharge it.[28]

The committee reports also make it clear that the sponsors of the legislation thought the statutes gave significance to the findings of examiners. Thus, the Senate Committee responsible for the Administrative Procedure Act explained in its report that examiners' decisions "would be of consequence, for example, to the extent that material facts in any case depend on the determination of credibility of witnesses as shown by their demeanor or conduct at the hearing."[29] The House Report reflects the same attitude,[30] and the Senate Committee Report on the Taft-Hartley Act likewise indicates regard for the responsibility devolving on the examiner.[31]

We do not require that the examiner's findings be given more weight than in reason and in the light of judicial experience they deserve. The "substantial evidence" standard is not modified in any way when the Board and its examiner disagree. We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's

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28. Salaries of trial examiners range from $7,600 to $10,750 per year. See Appendix to the Budget of the United States Government for the fiscal year ending June 30, 1952, p. 47.

29. S. Rep. No. 752, supra, 24, reproduced in S. Doc. No. 248, supra, 210.

30. H. R. Rep. No. 1980, 79th Cong., 2d Sess. 38-39, reprinted in S. Doc. No. 248, supra, 272-273. The House Report added that "In a broad sense the agencies' reviewing powers are to be compared with that of courts under section 10(e) of the bill." The language of the statute offers no support for this statement.

31. S. Rep. No. 105, 80th Cong., 1st Sess. 9, quoted in 1 Legislative History of the Labor Management Relations Act 1947, p. 415.

than when he has reached the same conclusion. The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. The significance of his report, of course, depends largely on the importance of credibility in the particular case. To give it this significance does not seem to us materially more difficult than to heed the other factors which in sum determine whether evidence is "substantial."

The direction in which the law moves is often a guide for decision of particular cases, and here it serves to confirm our conclusion. However halting its progress, the trend in litigation is toward a rational inquiry into truth, in which the tribunal considers everything "logically probative of some matter requiring to be proved." Thayer, A Preliminary Treatise on Evidence, 530; Funk v. United States, 290 U.S. 371, 54 S.Ct. 212, 78 L.Ed. 369. This Court has refused to accept assumptions of fact which are demonstrably false, United States v. Provident Trust Co., 291 U.S. 272, 54 S.Ct. 389, 78 L.Ed. 793, even when agreed to by the parties, Swift & Co. v. Hocking Valley R. Co., 243 U.S. 281, 37 S.Ct. 287, 61 L.Ed. 722. Machinery for discovery of evidence has been strengthened; the boundaries of judicial notice have been slowly but perceptibly enlarged. It would reverse this process for courts to deny examiners' findings the probative force they would have in the conduct of affairs outside a courtroom.

We therefore remand the cause to the Court of Appeals. On reconsideration of the record it should accord the findings of the trial examiner the relevance that they reasonably command in answering the comprehensive question whether the evidence

supporting the Board's order is substantial. But the court need not limit its reexamination of the case to the effect of that report on its decision. We leave it free to grant or deny enforcement as it thinks the principles expressed in this opinion dictate.

Judgment vacated and cause remanded.

Mr. Justice BLACK and Mr. Justice DOUGLAS concur with parts I and II of this opinion but as to part III agree with the opinion of the court below, 2 Cir., 179 F. 2d 749, 753.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 935

THE RIVERSIDE PRESS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

AND

LOCAL 267, DALLAS-FORT WORTH LITHOGRAPHERS AND PHOTOENGRAVERS INTERNATIONAL UNION, AFL-CIO,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO 56

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Fifth Circuit is set forth in the Petition as Appendix B thereto and is reported at 415 F. 2d 281.

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1. The above caption differs from that found in the Petition because of Petitioner's failure to designate Local 267, Dallas-Fort Worth Lithographers and Photoengravers International Union, AFL-CIO, as a Respondent in this case, despite the fact that by order dated March 28, 1968, the Court of Appeals for the Fifth Circuit granted Respondent Union's motion to intervene. In this respect, of course, the Petition fails to comply with Supreme Court Rule 21(6).

JURISDICTION.

The jurisdictional allegations set forth in the Petition are correct.

QUESTIONS PRESENTED.

1. Is a party entitled to a hearing in an unfair labor practice proceeding when all relevant facts have either been determined in prior representation proceedings or are not in any way controverted?

2. In the absence either in briefs or oral argument in support of a Petition for Review of any argument questioning in any way the adequacy of certain findings of the Board, is a Court, confronted with such a petition, which raises only a narrow procedural issue, and a cross-petition for enforcement, required to examine, *sua sponte*, the whole record in order to determine that those findings are supported by substantial evidence?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

In addition to those cited in the Petition, the following statute is relevant:

National Labor Relations Act, as amended, Section 6, 29 U. S. C. 156, 61 Stat. 140:

> The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this subchapter.

STATEMENT OF THE CASE.

While the Statement of the Case found in the Petition (pp. 3-6) outlines in skeletal form the proceedings to date, it is replete with significant omissions which Respondent believes are sufficiently important to be called to the attention of the Court.

The election in this case, which occurred on September 27, 1966, was held pursuant to a Decision of the Regional Director finding an appropriate unit and directing an election following a hearing on July 11, 1966. That hearing was conducted pursuant to Section 9(c)(1) of the Act.[2]

The election resulted in an inconclusive vote, as four ballots were challenged by Respondent Union on the ground that the voters were supervisors. Those ballots were sufficient to affect the results of the election.

Thereafter, Petitioner communicated with the Regional Director urging that the challenges be overruled. In support of that contention Petitioner stated, as reported by the Trial Examiner, that

> the record in the representation case "conclusively establish[es] that all matters relating to the supervisory hierarchy of the Employer were fully litigated [and determined] in the representation hearing" (Appendix B-29).

Petitioner went on to urge that, if the Regional Director disagreed with its position as to the challenges,

> . . . *the Employer requests that the Regional Director designate a hearing officer and schedule a hearing for the purpose of determining the status of the employees whose ballots were challenged* (Appendix B-29-B-30) (Emphasis added).

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2. The Labor Management Relations Act, 1947, as amended, 61 Stat. 136, 29 U. S. C. Sec. 151 *et seq.*, will be referred to hereinafter as "the Act."

Then, as Petitioner states, the Regional Director issued his Supplemental Decision and Order on December 2, 1966, ruling in Petitioner's favor with respect to two of the four challenged ballots. When those two ballots were counted, the vote still was inconclusive.

Consequently, the Regional Director, pursuant to Section 102.69 of the Board's Rules and Regulations, directed that a hearing be held "for the purpose of making credibility resolutions, findings of fact and recommendations going to their supervisory status" (R. 45).[3] Section 102.69 *inter alia,* provides for post-election hearings "when it appears that substantial and material issues of fact exist which can be resolved only after a hearing . . ." Section 102.69(d) further provides that, at the conclusion of such hearing, the hearing officer shall "cause to be served upon the parties a report resolving questions of credibility and containing findings of fact and recommendations as to the disposition of the issues".

Thereupon, in a memorandum to the hearing officer, dated January 21, 1967, Petitioner again took the position that the supervisory status of the employees "was fully inquired into at the hearing herein of July 21, 1965 [actually July 11, 1966] . . ." (R. 137).

Petitioner appeared at the hearing now being questioned, which it had specifically requested, and was afforded "full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues" (R. 48). At that hearing Petitioner introduced an exhibit in the form of a motion setting forth its contention that the hearing was contrary to law "as the matter had been litigated at a prior representation hearing" (R. 55). *No objection was made prior to or during the hearing as to its form or as to the request of the Regional Director that*

3. "R." references are to the pleadings, decision and order of the Board, printed as Volume I, Transcript of Record.

the Hearing Officer make credibility resolutions, findings of fact, and recommendations.

On February 9, 1967, the Hearing Officer filed his report on the remaining two challenges, ruling that both employees were supervisors. Petitioner duly filed its exceptions which in no way challenged the form of the hearing or the fact that the Hearing Officer made credibility resolutions, findings of fact, and recommendations. Thereupon, the Regional Director filed his Second Supplemental Decision and Certification. That Decision disagreed with the recommendation of the Hearing Officer as to one of the ballots and ruled that it should be counted. It affirmed the Hearing Officer with respect to the ballot of Andrew Schilling, concluding that he was a supervisor, noted that the vote favored the Union, and duly certified it as the representative of the employees in an appropriate unit.

Thereafter, in due course, followed Petitioner's Request for Review, its denial by the Board, the Union's Charge Against Employer, the Complaint and Notice of Hearing, the Petitioner's Original Answer, the General Counsel's Motion to Strike Portions of that Answer and Motion for Judgment on the Pleadings, the Order Referring the Motion to Trial Examiner for Ruling, and the Trial Examiner's Order to Show Cause on the Motions of the General Counsel (R. 73-117). In none of these documents does Petitioner raise, nor is there any mention of, an objection to the form of the hearing or to the fact that the Hearing Officer made credibility resolutions, findings of fact, and recommendations.

On October 9, 1967, Petitioner filed its "Response to Order to Show Cause on Motion of General Counsel to Strike Portions of Answer and on Motion for Judgment on the Pleadings" (R. 118-34). In that document Petitioner asserts, *for the first time,* its contentions that it is entitled

to a hearing before a Trial Examiner on the status of Andrew Schilling, that the post-election hearing before the hearing officer was improper, unauthorized, and illegal, and that the hearing officer had totally exceeded his authority by making credibility resolutions, findings of fact, and recommendations. Significantly, there was no discussion in that document as to the appropriateness of the unit, although Petitioner denied it "in order that it may preserve such point for judicial review" (R. 120).

Thereafter, on November 21, 1967, the Trial Examiner issued his Intermediate Decision and Recommended Order, concluding that Respondent "has refused to bargain collectively in violation of Section 8(a)(5) of the Act and has interfered with, restrained and coerced its employees in violation of Section 8(a)(1) of the Act". In that decision, which will be considered more fully later, the Trial Examiner addressed himself to each of Petitioner's contentions, some of which are raised again in this Court (Appendix B-28-B-43).

Following Petitioner's "Exceptions to the Trial Examiner's Decision", the Board, on February 8, 1968, issued its Decision and Order affirming in all respects the decision of the Trial Examiner (Appendix B-43-B-44).

Petitioner thereupon filed its Petition for Review in the Court of Appeals for the Fifth Circuit, and the Board cross-petitioned for enforcement. In its petition in that court, Petitioner again chose not to press the issue of the adequacy of the evidence to support the conclusion of the Regional Director as to the status of Schilling (Appendix B-7). The Court of Appeals affirmed the Decision and Order of the Board and thereafter denied Petitioner's request for rehearing (Appendix B-7-B-27).

REASONS FOR DENYING THE WRIT.

Petitioner seeks to raise three issues. First, it asks whether objections to elections may be resolved in a post-election hearing, which, as Petitioner points out, is not specifically provided for by statute but is provided for in the Board's Rules and Regulations. Secondly, it asks whether findings and conclusions made in such a hearing may be binding in a subsequent unfair labor practice proceeding. Finally, Petitioner argues that, despite the fact that it did not in any way challenge or question the appropriateness of the unit before the Court of Appeals, the court nonetheless was obligated to determine whether the Board's order was "supported by substantial evidence on the record as a whole" (Petition p. 2).

It is the position of Respondent Union that none of these questions, particularly in light of the particular facts of this case, warrant the granting of a Petition for Certiorari.

1. The First Issue Raised by Petitioner Is Not Before The Court and Is Wholly Without Significance.

The first issue raised by Petitioner concerns the propriety of resolving objections to an election in a post-election hearing. Both the majority and the dissent in the Court of Appeals held that Petitioner had waived any such issue by specifically requesting the hearing now questioned and by failing to make a timely objection thereto. Moreover, the court held that, in any event, such an assertion was "frivolous in the light of the Board's wide discretion in fulfilling its section 9(c) function of certifying election results" (Appendix B-4; B-10).[4] Clearly, this issue is wholly without significance.

4. Such hearings, of course, are expressly provided for by the provisions of 29 C. F. R. § 102.69(c), promulgated pursuant to authority given the Board in Section 6 of the Act. Moreover,

2. The Second Issue Raised by Petitioner Is a Well-Settled Point of Law and Petitioner Advances No Reasons Why It Should Be Changed.

The second issue raised by Petitioner, namely, whether findings and conclusions made in such a hearing are binding in a subsequent unfair labor practice proceeding, was also decided adversely to Petitioner by both the majority and the dissent in the Court of Appeals (Appendix B-4-B-7; B-9-B-10).

Although Petitioner casts the issue as one concerning the standards of evidence applied in unfair labor practice as opposed to representation hearings, it is clear that essentially what is being urged is nothing but a variant of an argument which has been heard and rejected in numerous cases. Petitioner simply wants to "relitigate" that which has already been determined in the prior representation proceedings. It, of course, is manifest that if the status of Schilling had been determined in the *pre-election* representation hearing, which also would not have been conducted in accordance with the rules of evidence which obtain in the United States district courts, Petitioner could not relitigate that issue in a subsequent unfair labor practice proceeding. *Pittsburgh Plate Glass Co.* v. *N. L. R. B.*, 313 U. S. 146, 85 L. ed. 1251, 61 S. Ct. 908 (1941). The Court of Appeals could perceive no reason why a different result should obtain "in view of the 'so far as practicable' language of Section 10(b)[5] and the representa-

such hearings have been commonly held for 17 years without challenge by Congress, during which time the Act has twice been amended.

5. Section 10(b) of the Act in pertinent part provides: "Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States . . ."

tion nature of the issue involved in the post-election hearing in this case" simply because the hearing in this case was a post-election one and it determined to "abide by the long line of cases that have found the representational determinations to be binding in a later unfair labor practice proceeding" (Appendix B-4-B-5).[6]

Here Petitioner has been given, *at its request,* a hearing in which it vigorously participated. Despite ample opportunity, Petitioner has nowhere indicated how different rules of evidence would or could have any substantial effect on the outcome of these proceedings.

The issue here is not novel and repeatedly has been resolved by the courts adversely to Petitioner. It clearly does not warrant review.

3. The Final Issue Raised by Petitioner Arises Solely by Virtue of the Unique Facts of This Case and Is Without Significance to the Administration of the Act.

The final issue raised by Petitioner relates to the proper standard of review to be applied by the reviewing court. It was this issue which occasioned the dissent in the Court of Appeals. It is framed as follows in the Petition:

> 3. Does a "cursory look" at the record by the Court of Appeals before enforcing a Board order under section 10(e) of the Act meet the clear statutory requirement that Board orders must be supported by substantial evidence on the record as a whole?

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6. The Court of Appeals distinguished *Heights Funeral Home, Inc.* v. *N. L. R. B.*, 385 F. 2d 879 (5th Cir. 1967) and *Amalgamated Clothing Workers* v. *N. L. R. B.*, 365 F. 2d 898 (D. C. Cir. 1966), noting that the issues involved therein were not precisely related to the earlier representation hearing. In this case, the court noted, "the supervisory status of Schilling was the key issue in the post-election proceeding, was vigorously contested, and was focused in terms of the validity of the union victory" (Appendix B-7).

That statement of the issue neglects to take into account the fact that Petitioner filed a Petition for Review of the Board's Decision and Order under Secion 10(f) of the Act *prior to* the Board's application for enforcement under 10(e). In that Petition for Review and in its brief and oral argument in support thereof it chose not to raise the question of the appropriateness of the unit, *i.e.*, Schilling's status. Both the majority and the dissent agreed that by that action Petitioner had waived its rights to contest the supervisory issue before the court (Appendix B-7-B-8; B-10). Under those rather unique circumstances, the analogy of the majority in regarding the situation as comparable to consent seems persuasive. And if that is the case, the standard of review adopted by the majority is clearly correct.

In any event, this issue is of the most peripheral character and the frequency with which it might arise is obviously very limited. It calls for an employer, actively litigating an unfair labor practice case, to decline for some reason to raise the substantive issues either in its Petition for Review or in its reply to the Board's Application for Enforcement. Such an occurrence may safely be regarded as isolated. Indeed, Judge Godbold, who in authoring the dissent, raised the issue, was not of the opinion that the issue warranted an *en banc* hearing by the Fifth Circuit (Appendix, B-23-B-24).

CONCLUSION.

For the reasons stated we respectfully request that this Court deny a Writ of Certiorari to review the judgment of the Court of Appeals for the Fifth Circuit entered in this case.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 935

THE RIVERSIDE PRESS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B 1–24) is reported at 415 F. 2d 281. The Board's decision and order (Pet. App. B 28–44) in the unfair labor practice proceeding are reported at 169 NLRB No. 107. The decisions in the related representation proceeding are set forth at R. 6–10, 42–45, 68–72.[1]

[1] "R." references are to the materials printed in Volume 1 of the transcript of record in the court of appeals. "J.A." references are to the portions of the testimony and the exhibits printed in Volume 2 of the joint appendix.

JURISDICTION

The judgment of the court of appeals (Pet. App. B 24–25) was entered on July 11, 1969, and a petition for rehearing was denied on September 11, 1969 (Pet. App. B 23–24). The petition for a writ of certiorari was filed on December 8, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board's procedure for resolving post-election issues is authorized by the National Labor Relations Act.

2. Whether the employer, by failing to contest the propriety of the Board's substantive findings in the court of appeals, waived his right to obtain full judicial review of those findings.

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in Appendix A to the petition (pp. 1–5).

STATEMENT

A. THE REPRESENTATION PROCEEDING

On June 16, 1966, Local 267, Dallas-Fort Worth Lithographers and Photoengravers International Union, AFL–CIO, filed a representation petition with the Board's Regional Director pursuant to Section 9(c)(1) of the National Labor Relations Act (Pet. App. A 1–2) seeking an election with respect to certain of the Company's employees (R. 1–5). Following

a preelection hearing held under that section[2] to determine the appropriate unit, the Regional Director directed an election in a unit of the Company's Dallas lithographic production employees (R. 6–10). On September 27, 1966, the election was held; 26 votes were cast for the Union, 22 against, and an additional 4 ballots were challenged by the Union on the ground that the prospective voters were supervisors and hence excluded from the unit.

The Act makes no explicit provision for a post-election procedure. Under its authority under Section 6 of the Act "to make * * * such rules and regulations as may be necessary to carry out the provisions of this Act," the Board long ago established such a procedure. Section 102.69(c) of the Board's Rules and Regulations (29 C.F.R. 102.69(c)) provides that, "if the challenged ballots are sufficient in number to affect the result of the election, the regional director shall investigate such * * * challenges," and then "issue a decision disposing of the issues and directing appropriate action or certifying the results of the election." Such "action by the regional director may be on the basis of an administra-

[2] Section 9(c)(1) provides that, upon the filing of a representation petition:

> * * * [T]he Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

tive investigation or, if it appears to the regional director that substantial and material factual issues exist which can be resolved only after a hearing, he shall issue and cause to be served on the parties a notice of hearing on said issues before a hearing officer." The Rules further provide (29 C.F.R. 102.69 (d)) that the hearing shall be conducted in accordance with the procedure governing pre-election hearings, "except that upon the close of such hearing, the hearing officer shall, if directed by the regional director, prepare and cause to be served on the parties a report resolving questions of credibility and containing findings of fact and recommendations as to the disposition of the issues." The Rules further provide that, where such a report is prepared and served, any party may "file with the regional director * * * exceptions to such report, with supporting brief, if desired" (*ibid.*).

Pursuant to these rules, the Regional Director conducted an administrative investigation, and on that basis overruled the Union's challenges to two of the ballots and directed that they be counted (R. 42–45). He also directed that, if the results of the election were still inconclusive after the two ballots were counted, a hearing be held before a hearing officer to be designated by him to determine the supervisory status of the two other voters—Marjorie Wiley and Andrew Schilling (R. 45). Both ballots were opened and found to have been cast against the Union; an employee of the Regional Office was designated as hearing officer to hear the issues and "to prepare and serve upon the parties a report concerning the resolu-

tion of credibility of witnesses, findings of fact, and recommendations" (R. 48).

At the post-election hearing, all parties "were afforded full opportunity * * * to examine and cross-examine witnesses and to introduce evidence" (R. 48). The hearing officer's report of the hearing found that both Wiley and Schilling were supervisors within the meaning of the Act, and accordingly recommended that the challenges to their ballots be sustained (R. 46–57). The Company filed exceptions with the Regional Director, challenging the substantive basis of the hearing officer's findings but not the propriety of the hearing procedure (R. 58–67). The Regional Director agreed with the Company that Wiley was not a supervisor, but sustained the Union's challenge to Schilling's ballot (R. 68–71).[3] Since the exclusion of Schilling's ballot gave the Union a majority among the unit employees voting, the Regional Director certified the Union as the exclusive bargaining representative of the Company's lithographic employees (J.A. 71).

[3] The Regional Director made the following findings: Schilling was the "foreman of the platemaking department," and was "responsible for platemaking" (R. 51; J.A. 154, 163). He assigned work to the other platemakers, instructed them on what to do, and checked their work (R. 52; J.A. 159–160). He also checked their timecards in conjunction with authorizing overtime (R. 52; J.A. 159, 195–196). Together with the supervisor of the pressroom, Schilling determined whether defective plates should be rejected or reworked (R. 52; J.A. 159–160). Finally, Schilling's responsibilities were accentuated by the circumstance that Lunt, admittedly a supervisor of the platemaking department, lacked the technical knowledge to oversee the internal operations of the section (R. 53; J.A. 166–167).

The Company requested the Board to review the Regional Director's decision, challenging the substantive basis of his ruling on Schilling; again it raised no question as to the propriety of the post-election hearing procedure (R. 73–94). The Board denied the request on the ground that it raised no substantial issues warranting review (R. 95).

B. THE SUBSEQUENT BOARD AND COURT PROCEEDINGS

The Company refused to bargain with the Union, the Union filed charges, and the General Counsel of the Board issued a complaint alleging that the Company had violated Section 8(a) (5) and (1) of the Act (R. 96–98, 99–105). After the Company answered (R. 106–107), the General Counsel moved for judgment on the pleadings (R. 108–114), and the Trial Examiner issued an order to show cause why the motion should not be granted (R. 116–117). In response, the Company proffered no new evidence, but contended that it was nonetheless entitled to relitigate the supervisory status of Schilling before a Trial Examiner in an unfair labor practice proceeding under Section 10 of the Act (R. 122–123).

The Trial Examiner concluded that, since there was no proffer of newly discovered or previously unavailable evidence, the Company was not entitled to relitigate issues previously determined in the representation proceedings (Pet. App. B 36). He added that the Company was estopped from questioning the legality of the hearing on challenges since it had requested

such a hearing initially[4] and had failed to except to the Regional Director's supplemental decision on procedural grounds (Pet. App. B 35–36). The Examiner accordingly granted the General Counsel's motion for judgment on the pleadings, found that the Company had violated Section 8(a) (5) and (1) of the Act, and recommended that the Company be ordered to bargain with the Union (Pet. App. B 37, 39–41). The Board adopted the Examiner's findings, conclusions, and order (Pet. App. B 43–44).

The court of appeals rejected the Company's contention that the procedure utilized by the Board to resolve the challenges was not authorized by the Act (Pet. App. B 3–7). The court (with Judge Godbold dissenting) further held that, since the Company had not challenged the Board's substantive finding respecting Schilling's supervisory status before the court—in its petition to review the Board's order, its brief, or in oral argument—it had in effect "waived" its right to obtain full judicial review of that issue (Pet. App. B 7–8). Accordingly, on finding that the Board had jurisdiction to make its order and "had not traveled outside the orbit of its authority," the court enforced that order (Pet. App. B 8–9).

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[4] On September 30, 1966, counsel for the Company, by letter in the nature of a brief to the Regional Director, contended that the challenges should be overruled on the ground that the voters involved were not supervisors, but urged further that, if the Regional Director disagreed with the Company's position, he should "designate a hearing officer and schedule a hearing for the purpose of determining the status of the employees whose ballots were challenged" (Pet. App. B 29–30).

ARGUMENT

1. Petitioner's basic contention is that the Board lacks statutory authority to hold a post-election hearing on challenges to voter eligibility, and that, even if the Board has such authority, the Company was entitled to relitigate the issue in an unfair labor practice proceeding before a Trial Examiner appointed in conformity with the requirements of the Administrative Procedure Act (5 U.S.C. 551, *et seq.*).

Although the Act does not expressly provide for post-election hearings in a representation proceeding, the Board's rule-making authority under Section 6 of the Act, *supra,* and its wide discretion in fulfilling its Section 9(c) function of certifying election results (see *National Labor Relations Board* v. *A.J. Tower Co.,* 329 U.S. 324, 330; *National Labor Relations Board* v. *Wyman-Gordon Co.,* 394 U.S. 759, 767), confer ample power to provide for such a hearing by rule. Such rules have long been in force, and are an established part of Board practice (Pet. App. B 4).

Where an unfair labor practice proceeding is simply a means of enforcing the Board's determination in a representation case,[5] the two proceedings "are really one" and "a single trial of the [representation] issue [is] enough." *Pittsburgh Plate Glass Company* v. *National Labor Relations Board,* 313 U.S. 146, 158, 162. Accordingly, the Board's rule, that issues decided

[5] An employer can obtain review of a Board representation determination in the court of appeals only by refusing to bargain, and thereby triggering an unfair labor practice proceeding. See *Boire* v. *Greyhound Corp.*, 376 U.S. 473.

in a representation case may not be relitigated in an unfair labor practice proceeding absent extraordinary circumstances, has won uniform judicial approval. *National Labor Relations Board* v. *National Survey Service, Inc.*, 361 F. 2d 199, 201–202, 204, 206 (C.A. 7); *Neuhoff Bros., Packers, Inc.* v. *National Labor Relations Board*, 362 F. 2d 611, 612–613 (C.A. 5), certiorari denied, 386 U.S. 956; *National Labor Relations Board* v. *Difco Laboratories, Inc.*, 389 F. 2d 663 (C.A. 6), certiorari denied, 393 U.S. 828; *National Labor Relations Board* v. *Sun Drug Co.*, 359 F. 2d 408 (C.A. 3). Nor does this involve a circumvention of the Administrative Procedure Act, for representation proceedings are exempted from the formal hearing requirements of that Act (5 U.S.C. 554(a)(6)).

Finally, there is no merit to petitioner's contention (Pet. 10) that, even if otherwise appropriate, the Board's post-election hearing must be subject to the limitation which Section 9(c)(1) imposes on pre-election hearings—namely, the hearing officer "shall not make any recommendations with respect [to the issue tried]." The basic reason for this limitation at the pre-election stage is that the hearing officer's report is purely an internal document prepared for the aid of the Board, and it is not served on the parties. See 1 Leg. Hist. of the Labor Management Relations Act 1947 (GPO, 1948) 431, 495–496. The hearing officer's report at the post-election stage is served on the parties, and thus they have an opportunity to contest his recommendations. The Board

was accordingly justified in not applying to post-election hearings the limitation which Section 9(c)(1) imposes on pre-election hearings. Moreover, as the court below properly noted (Pet. App. B 5–6), the limitation on pre-election hearings has been rendered virtually meaningless by the 1959 amendment to Section 3(b) (Pet. App. A 1), which permits the Board to delegate its powers under Section 9 to its regional directors, subject to a discretionary right of review; "the Board need not apply a dead letter law to post-election hearings, where it does not literally apply" (Pet. App. B 6).

2. There is no substance to petitioner's further contention (Pet. 20–23) that the court of appeals was required, *sua sponte,* to exercise plenary review over the Board's substantive finding respecting Schilling's supervisory status. Although it raised the substantive issue before the Board, petitioner did not do so at any time before the court of appeals (see Pet. App. B 10). In these circumstances, it is just as though petitioner had consented to the entry of an enforcement decree, if its procedural contention were overruled. Where there has been consent to the entry of a decree, the reviewing court need satisfy itself only that the Board has not "patently traveled outside the orbit of its authority." *National Labor Relations Board* v. *Ochoa Fertilizer Corp.,* 368 U.S. 318, 322. The court below correctly concluded that the Board had not done so here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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